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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1941

No. 527

CARPENTERS AND JOINERS UNION OF AMERICA, LOCAL No. 213, ET AL., PETITIONERS,

vs.

RITTER'S CAFE, ET AL.

ON WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE FIRST SUPREME JUDICIAL DISTRICT OF TEXAS

PETITION FOR CERTIORARI FILED AUGUST 19, 1941.

CERTIORARI GRANTED OCTOBER 13, 1941.

SUPREME COURT OF THE UNITED STATES

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ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE FIRST SUPREME JUDICIAL DISTRICT OF TEXAS

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positive defiance of the constitutional rights of these plaintiffs in selecting the person with whom they wish and desire to do business and the performance and conducting [fol. 12] of a lawful enterprise, and is in direct violation of the anti-trust statutes, as well as statutes relating to the restraint of trade, and monopolies, in the State of Texas. That in connection with the studied design and conspiracy on the part of these defendant Unions and the members thereof, to ruin plaintiffs' business, should they refuse to meet the demants of said Unions to discontinue transacting business with W. A. Plaster, the said defendants and each of them have threatened to continue such activities against these plaintiffs, which will be of a continuous nature each day. That said defendants are attempting to submerge the constitutional rights guaranteed these plaintiffs and to foist upon said plaintiffs their demands, and which, if continued, denies plaintiffs the right to operate their own business, with the consequent loss and deprivation of their means of earning a livelihood; and that there is no other means of seeking redress against such unlawful and illegal acts, other than by the interposition of a Court of Equity; and that in order for these plaintiffs to seek and secure further redress, would necessitate a multiplicity of suits at a great cost and expense, and especially would such procedure be futire and inadequate by reason of the fact that said defendants are insolvent and without property subject to execution to compensate these plaintiffs for the loss, damage and injury suffered by these plaintiffs in connection with the acts complained of herein, committed by these defendants against these plaintiffs and their place of business. Plaintiffs would further allege that by reason of the unlawful and illegal acts on the part of the defendants, and each of them, directed against these plaintiffs in the conduct of their lawful business, plaintiffs will be forced to engage the services of a truck as well as drivers, in order to secure articles of food and other commodities incidental to the operation of their business in order to carry on their business, and that the reasonable, usual and necessary cost incident to the engagement of said truck and driver is five dollars per day, which sum plaintiffs will be obliged to pay each day since said acts on the part of said defendants have [fol. 13] been initiated, and which sums of money said plaintiffs will be required to pay each and every day hereafter as long as defendants are permitted to carry on such unlawful

acts and illegal picketing. In this connection, plaintiffs would allege that since said unlawful and illegal picketing has been initiated against them, they have been unable to get any person, firm or corporation to deliver to them any food stuffs and other commodities necessary and incidental to the operation of their business, by reason of the influence and baneful persuasion exercised over such former dealers with these plaintiffs by said defendants, and each of them, who, as aforesaid, have conspired to drive these plaintiffs out of business and to ruin and injure their business and property, unless plaintiffs submit to the wishes and whims of said local Unions in their demands that these plaintiffs refuse to do business with W. A. Plaster, and to deal only with persons chosen by these local unions.

VII

Plaintiffs would allege that said defendants, and each of them, have discriminated and are now discriminating against them in the lawful conduct and operation of their business, in that said defendants have selected these plaintiffs' place of business as the only place to picket, in spite of the fact that there are many other business institutions, etc., which are now contracting with W. A. Plaster, and have never been molested by pickets, and have never been approached by any of these defendants and/or their representatives, and had demands made upon them by these defendants as have been and are now being made upon these plaintiffs. That these plaintiffs have an insignificant cafe, and justly feel that a great irreparable harm and injury is being visited upon them by these defendants engaging in secondary picketing and picketing activities, especially since they have violated no law and are merely exercising their constitutional right to engage in trade and commerce and in transacting and doing business with W. A. Plaster.

VIII

Plaintiffs would further show unto the Court that the acts of defendants and each of them, as set out herein, were and are willful, and fraudulent misrepresentations, as well as [fol. 14] malicious, and committed for the sole purpose of injuring and damaging plaintiffs and their place of business, and that their damages are proximately and directly the result of the acts of defendants and each of them, is far in excess of the sum of one thousand dollars.

Wherefore, Premises Considered, Plaintiffs pray citation issue to defendants and plaintiffs pray leave of the Court

to amend this petition and to make parties to this suit of any other persons whose names may hereafter be ascertained who may be found to be engaged in such conspiracy or to be doing any of the unlawful acts herein complained of, or of a similar nature, and for leave to amend this petition to supply any technical deficiency, if such be found to be wanting in this petition.

Plaintiffs further pray that a writ of injunction issue out of this most Honorable Court, agreeable to its practice, enjoining, restraining and prohibiting defendants hereinabove named, and each of them, and all other persons who shall have personal service or otherwise shall have notice of said injunction, from:

Combining, conspiring, and confederating to interfere with, hinder or prevent plaintiffs from transacting business with W. A. Plaster, in the erection of said building.

And from in any way or manner or to any extend whatsoever by use of suggestions, importunities, requests, threats of personal injury, or promise of anything of value or gain, or threatening injury to business, interfering with or stopping plaintiffs or any of the members and employees in their place of business from carrying on and trading with W. A. Plaster in the erection of said building, and from any action of any nature whatsoever tending to damage or destroy the business and good will of these plaintiffs, and from in any manner attempting to carry out their above described conspiracy, and from establishing any picket lines at plaintiffs' place of business, and from resorting to any acts of intimidation or coercion against these plaintiffs, their employees and any of their customers; that a restraining order issue and be continued in full force and effect until a hearing can be had, and that upon a hearing a temporary injunction issue, restraining these defendants, and [fol. 15] each of them, from doing each and all of the aforesaid acts, and further restraining them, and each of them, from influencing any of the said aforesaid acts to be committed or be done; that upon final hearing hereof, said injunction be made permanent; for all costs of court incurred herein, and for such other and further relief, both general and special, lawful and equitable, that they may show themselves justly entitled to.

Bernard A. Golding, Vinson, Elkins, Weems & Francis, Attorneys for Plaintiff.

Duly sworn to by E. R. Ritter, jurat omitted in printing.

In District Court of Harris County

Order to Show Cause Why Temporary Injunction Should Not Be Granted—November 28, 1939

It is ordered that the Clerk of this Court shall issue notice which shall require defendants to appear in the Court Room of this Court on the 6th day of December, A. D. 1939, at 9 A. M., to show cause, if any they have, why a temporary injunction should not be granted upon such petition, effective until the final decree of this Court. Such writ shall be served by the Sheriff or Constable.

Entered, this the 28th day of November, A. D. 1939.

Kenneth McCalla, Judge.

[File endorsement omitted.]

[fol. 16] In District Court of Harris County

[Title omitted]

Original Answer—Filed December 7, 1939

To the Honorable Judge of said Court:

Come now the Defendants in the above styled and numbered cause and for Answer herein say:

1.

That they demur and except generally to Plaintiffs' Original Petition filed herein and say the same is wholly insufficient in law and sets up no cause of action against either of said Defendants and of this they pray the judgment of the Court.

2.

For special exception to Plaintiffs' Original Petition these Defendants say the same, and especially these parts of the same which seek to enjoin the carrying of banners or placards, are wholly insufficient in law and set up no cause of action or right to injunctive relief against either of these Defendants in that it appears from the face of said Petition that Plaintiffs are seeking to enjoin these Defend-

ants from exercising the right and privilege of free speech and of freedom of the press guaranteed to these Defendants by the Fourteenth Amendment to the Constitution of the United States and that the relief prayed for by Plaintiffs in their Original Petition if granted to Plaintiffs by this Court will illegally impair, destroy and abridge the privileges and rights granted to Defendants by the Fourteenth Amendment of the Constitution of the United States and of this the Defendants pray the judgment of the Court.

[fol. 17]

3.

For further special exception to Plaintiffs' Original Petition these Defendants say the same, and especially those parts of the same which seek to enjoin the carrying by Defendants and their agents and members, of banners and placards, are wholly insufficient in law and set up no cause of action or right of injunctive relief against either of these Defendants in that it appears from the face of said Petition that Plaintiffs are seeking to enjoin these Defendants from exercising the right and privilege of free speech and of freedom of the press guaranteed to these Defendants by Section 8 of the Bill of Rights of Texas and that the relief prayed for by Plaintiffs in their Original Petition if granted to Plaintiffs by this Court will illegally impair, destroy and abridge the privileges and rights granted to the Defendants by Section 8 of the Bill of Rights of Texas and of this the Defendants pray the judgment of the Court.

4.

For answer herein if needs be, these Defendants deny all and singular each and every allegation in Plaintiffs' Original Petition contained and say the same are untrue in whole and demand strict proof of same and of this they put themselves upon the country.

5.

For further answer herein if needs be, these Defendants say that they have been guilty of no violence or threatening of violence. That certain of their members have peaceably carried, are carrying and desire to continue to carry placard-, upon the public sidewalks of the City of Houston in

front of Plaintiffs' places of business in a peaceful, law abiding manner with the following inscriptions thereon;

"This place is unfair to Carpenters and Joiners Union of America, Local Number 213."

and also other placards with the following inscriptions thereon:

"This place is unfair to Painters' Local Number 130."

These Defendants say that they now have one representative from each union carrying placards in front of Plain-
[fol. 18] tiffs' places of business with the inscriptions above set forth or similar inscriptions printed thereon.

That defendants and their representatives have not and will not trespass or go upon any property or place of business of Plaintiffs or violate any State law or City ordinance.

That Defendants desire to continue having not more that one representative from each of the two Defendant Unions to stand or walk in a lawful manner upon the public sidewalks in front of each of Plaintiffs' places of business and to carry placards bearing the above or similar inscriptions.

That defendants do not desire nor do they intend and in fact will not do anything more than have at one and the same time, one representative from each of defendants' to lawfully walk upon the public sidewalks in front of each of Plaintiffs' places of business carrying placards with the above set forth or similar inscriptions printed, painted or stamped thereon.

6.

These Defendants say that they have a dispute and disagreement with Plaintiffs and with plaintiffs' contractor, W. A. Plaster, involving labor and labor contracts.

7.

Defendants say that in carrying said placards upon the public sidewalks of the City of Houston, they are exercising and enjoying a privilege and right accorded to them by the Fourteenth Amendment to the Constitution of the United States and By Section 8 of the Bill of Rights of the State of Texas.

8.

These Defendants further say that any judgment or decree of this Court enjoining them from thus exercising their

[fols. 1-4] [Caption omitted]

IN DISTRICT COURT OF HARRIS COUNTY

No. 262,509

RITTER'S CAFE, et al.

vs.

CARPENTERS & JOINERS UNION OF AMERICA, LOCAL NUMBER 213, et al.

ORIGINAL PETITION—Filed November 28, 1939

To the Honorable Judge of Said Court:

[fol. 5] Now in the above styled and numbered cause, come Ritter's Cafe, and E. R. Ritter, hereinafter called Plaintiffs, complaining of Carpenters & Joiners Union of America, Local Number 213, a voluntary incorporated association, with C. P. Driscoll as its business agent, and W. L. Thomas, President thereof, and upon which persons service of citation may be had, and whose officers are located in the Labor Temple, 707½ Rusk Avenue, Houston, Harris County, Texas, and Painters Local Union Number 130, a voluntary incorporated association, with Calus A. West as its business agent, and O. R. Smith, President thereof, and upon which persons service of citation may be had, and whose offices are located at 713 Louisiana Street, Houston, Harris County, Texas, and all of the members of both said defendant associations, hereinafter called defendants, and for cause of complaint, and/or action, would respectively show unto the Court as follows:

I

That E. R. Ritter is the sole owner and operator of "Ritter's Cafe," and so operates under said trade name, same being located at 418 Broadway, Houston, Harris County, Texas, that W. L. Thomas is a citizen and resident of Houston, Harris County, Texas, and is president of said Local Number 213; that C. P. Driscoll is a citizen and resident of Houston, Harris County, Texas, and is business agent of said Local Number 213; that O. R. Smith and Calus A. West are both citizens and residents of Houston,

Harris County, Texas, and are president and business agent respectively of said Local Union Number 130, and that the other members of said Local Unions, to-wit: Number 213 and Number 130, their names being for the most part unknown to these plaintiffs, and too numerous to mention herein, reside in Harris County, Texas, and are now engaged in various occupations pertaining to carpentry and painting businesses, and particularly in connection with the construction of homes, houses, dwellings and business structures, and in the repair of said structures.

II

That plaintiffs and each of them are engaged in conducting and operating a restaurant and/or cafe, known as "Ritter's Cafe," located, as aforesaid, and have been for some period of time, so operating such restaurant and/or [fol. 6] cafe under such name and styled, and have had for, some time and now have in their employment six persons in connection with the operation of such cafe and business.

III

That at no time have plaintiffs been a member of either of the local unions mentioned herein, to-wit: Local Unions Number 213 and Number 130, respectively, in connection with the operation and management of their restaurant business, during the period that such restaurant business has been operated and managed by them; that none of the employees, past or present, in said cafe, have ever been a member of either of said local unions; that said local unions mentioned herein have jurisdiction only over such employees engaged in carpentry work and in the painting industry, and have absolutely no jurisdiction whatsoever over persons engaged in and employees engaged in culinary workers, waitresses, waiters, cooks, etc., and that the only organization, if any, having jurisdiction over such employees, is the Hotel & Restaurant Employees Local Union Number 808. Plaintiffs would further allege that they have not suggested nor imposed any rule applicable to persons employed by them as to whether they are or are not members of any union, and that they have never refused to employ persons because of his or her membership in any union; that in this connection, plaintiffs would aver that they employ only persons in good standing with Local Union Number 808, referred to herein, that they pay their em-

ployees wages which are satisfactory to them and commensurate with their services; that all of plaintiffs' employees are receiving the prescribed scale of union wages, that they are satisfied with same, and with their hours of work and employment; that they are in perfect harmony and accord with plaintiffs herein with respect to wages and general working conditions, that plaintiffs' employees are not dissatisfied in any way, and have no dispute or grounds for any dispute, or altercation with plaintiffs, and no controversy of any kind has existed or exists at this time between plaintiffs and their employees or any of them, and plaintiffs have discharged no employee, nor retained any person and/or employee objectionable to other employees; that none of the employees have struck or threatened to strike or expressed, directly or indirectly, any dissatis- [fol. 7] faction with the operation, conduct or government of plaintiffs' business, and further, plaintiffs would say that there is absolutely no controversy of any kind or character existing or has ever existed between themselves and Local Union Number 808, which assumes jurisdiction over plaintiffs' employees.

IV

That plaintiffs' business is primarily one concerned in the dispensation and sale of cooked food stuffs, and other incidental commodities which are ordinarily offered for sale to the general public by cafes similarly organized as plaintiffs'. That some months prior to the date of filing of this bill of complaint, one of the plaintiffs herein, to-wit, E. R. Ritter, was approached by W. A. Plaster, who is engaged in the contract business, with a view of having said Plaster erect for said E. R. Ritter a small structure situated and located about a mile or two from plaintiffs' present place of business, and located at 2810 Broadway, Houston, Harris County, Texas; that in connection with plaintiffs' arrangement with said W. A. Plaster, it was agreed between said parties that the said W. A. Plaster make his own arrangements with reference to persons engaged and employed in the construction of said building, and that said restaurant would be relieved of any and all concern with the erecting of such structure, and that said W. A. Plaster agreed to proceed with the operation and erection of said structure, with the definite understanding that no discrimi-

nation would be shown as to what employees or persons should be employed in the construction and errection of such building, but that the same should be attended to and maintained by the said W. A. Plaster. That the said W. A. Plaster did proceed in accordance with the terms of said agreement with E. R. Ritter, and that immediately thereafter the beginning of such construction work, said local unions, numbers 213 and 130 respectively, and especially the officials named herein, and each of them, in their respective official capacities, as well as other members of said local unions, whose names are not now known to these plaintiffs, but peculiarly with the knowledge of these defendants, inaugurated a scheme, design and conspiracy to harrass, annoy and virtually ruin the business of these plaintiffs, by [fol. 8] picketing and causing to be picketed these plaintiffs' place of business located some mile or two miles away from where the building is being constructed by authorized pickets, who, by information and belief, are virtually strangers to these plaintiffs, and have never been employed by these plaintiffs, and are virtually known as "professional pickets", and in the alternative, if such pickets are not as deseribed herein, then they are such persons who have been discharged from their employment because of inefficiency, and were instructed by officials of said local unions, and the unions themselves, to picket plaintiffs' place of business, and not the place where such building is being constructed, every hour of the day and night that plaintiffs' place of business is open to the general public, and such pickets march *march* back and forth in front of plaintiffs' place of business with placards reading as follows:

"This place is unfair to Carpenters & Joiners Union of America, Local Number 213"

and

"This place is unfair to Painters Local Number 130"

that such pickets picketed plaintiffs' place of business until the said W. A. Plaster discontinued further progress in connection with the construction of said building; that said W. A. Plaster has resumed his activities in connection with the construction of said building, and said pickets of both union organizations, acting under instruetions, as aforesaid, are now picketing plaintiff's place of business, interfering with said business, and persuading and inducing plaintiffs'

guests from patronizing their restaurant, and interfering with the delivery of foodstuffs and accessories at plaintiffs' place of business, thus making it necessary for plaintiffs to make arrangements for the purchase and delivery of food stuffs necessary to conduct their business, at great expense and with great inconvenience and embarrassment, and constantly annoy, embarrass and harass plaintiffs' patrons and guests who desire to enter and leave plaintiffs' place of business; that said local unions have singled out plaintiffs' place of business, notwithstanding the fact that [fol. 9] it is in good standing with the labor organization having jurisdiction over the employees engaged therein, because it is situated within an industrial belt, and said local unions and their officials, hope by this method to ruin and force plaintiffs out of business, unless the contractor, W. A. Plaster, employs persons selected by said unions in the construction of said building, and that unless these plaintiffs force and compel the said W. A. Plaster to meet the unlawful and illegal demands of the officials and membership of these unions, their place of business will be continually and constantly picketed until plaintiffs be forced to close their doors and abandon the operation of a lawful enterprise and lose a substantial investment already placed in said place of business, known as "Ritter's Cafe," and that the placing of said pickets patrolling in front of said plaintiffs' place of business, has kept a great many and the majority of plaintiffs' former customers from entering and transacting business with them, and has created a great state of confusion and unrest and uneasiness in plaintiffs' employees, with the threatening ultimatum from the officials of Local Union Number 808 that it will compel plaintiffs' employees to walk out and abandon plaintiffs' place of business, thereby creating great loss and damage far in excess of one thousand dollars; all in violation of the anti-trust statutes, combination and monopoly statutes of the State of Texas, and in direct contravention of the statutes as affecting legal picketing, and with the studied design and desire to coerce and force these plaintiffs to abandon a legal and valid as well as binding contract with W. A. Plaster, all of which constitutes a combination and organized effort to intim-ate and coerce plaintiffs from doing business with W. A. Plaster, and to force and compel these plaintiffs to submit to the dictation of these defendants in the management of their own affairs, in connection with the operation

and management of the restaurant business, and that said union officials have advised these plaintiffs that their business would no longer exist unless said E. R. Ritter discontinued said business with W. A. Plaster on the basis and terms set out herein; all of which picketing plaintiffs allege constitutes secondary boycotting and secondary picketing, that such will continue without interruption unless restrained and enjoined as hereinafter plead, with the studied [fol. 10] purpose and design to accomplish the purposes stated by these officials, unless the whims and dictates of said local unions and their membership is accepted by these plaintiffs.

V

That plaintiffs know of no reason why said defendants should picket and/or cause to be picketed, and undertake and conspire to destroy and injure their business, especially so, since they have had no altercation or dealings, directly or indirectly, with said defendant unions, to justify defendants' actions as aforesaid, and plaintiffs aver that such picketing is seriously injuring their business and causing them to suffer loss, and that such picketing has already injured their business and caused them a loss of profit and income to the extent of approximately eight--five per cent; that the defendants and each of them herein, are insolvent, and have no property subject to execution so far as these plaintiffs are advised and believe, and that said defendants, and each of them, in continuing and causing to be continued such picketing, constitute an irreparable harm and damage as well as injury, unless restrained by this Honorable Court with its most gracious writ of injunction; and plaintiffs fear that said defendants, and each of them, will continue the aforesaid threats, acts, conduct and pressure, coercion and influence, and continue to interfere with their contractual relationship and their right of freedom to trade with W. A. Plaster, which these plaintiffs aver is a valuable as well as vested property right, and that defendants will continue to injure plaintiffs in their business and damage them, and interfere with their property rights in dealing and transacting business with whom they please, so long as the same constitutes a lawful act as well as for a lawful purpose, and that they will continue such unlawful acts of intimidation, threats and violence, and the other acts complained of herein, and that as a result thereof, plaintiffs

will suffer irreparably financial loss and damage in the conduct and operation of their business, unless this most Honorable Court, by its writ of restraint and injunction, enjoins defendants and each of them, from continuing said conspiracy and design to ruin plaintiffs' business, and from [fol. 11] continuing such picketing and prevent such unlawful and illegal acts of said defendants and persons acting for and in behalf of such defendants, their members, servants, agents and employees by its writs of restraint and injunction, and plaintiff alleges that the necessity is great in this emergency, for the equitable interposition of this Court with its writs of restraint and injunction, to enjoin the defendants, the members of said local unions, their servants, agents and employees from continuing the acts complained of herein, and from picketing plaintiffs' place of business, and from gathering thereat and carrying signs/or banners, and from harrassing, annoying and damaging plaintiffs' place of business and their right to contract and deal with whom they please, and their right to conduct business at the place designated by them, in the city of Houston, Texas, and from interfering in any way with plaintiffs' employees and plaintiffs' customers and plaintiffs' prospective customers and guests, and others passing who might enter and become patrons of plaintiffs' place of business.

VI

Plaintiffs further aver that said pickets have never been employed by said plaintiffs, and that said defendants are strangers to them, and that none of them are past or prospective employees in their place of business; that plaintiffs have — had any dispute or controversy with said pickets or with said Local Unions Number 213 and Number 130, or any of the members thereof, of any kind or character, and especially have they had no dispute or controversy with reference to wages, hours of employment and general working conditions as between these plaintiffs and their employees, and further that the relationship of employer and employees has never existed and does not now exist between these plaintiffs and any of the members of said Local Unions Number 213 and Number 130, or any member thereof or the defendants to this suit; that no strike has ever been called against these plaintiffs and that by reason of these acts, conduct, intimidation, coercion, threats and other unlawful acts and unlawful conduct as set out herein, are in

right of free speech and of freedom of the press as guaranteed and granted to them by the Constitution of the United States as well as by the Bill of Rights of the State of Texas will be a violation and an abridgement of the Constitution of the United States and also of the Bill of Rights of the State of Texas, and therefore a void judgment.

[fol. 19] Wherefore, having fully answered herein, Defendants pray that Plaintiffs take nothing by this suit and that all injunctive relief prayed for herein by Plaintiffs be in all things denied and that Defendants go hence without day and recover their costs.

Sewall Myer, Attorney for Defendants.

Duly sworn to by Campbell R. Overstreet, jurat omitted in printing.

[File endorsement omitted.]

IN DISTRICT COURT OF HARRIS COUNTY

No. 262,569

RITTER'S CAFE, et al.

vs.

CARPENTERS AND JOINERS UNION OF AMERICA, LOCAL NO. 213, et al.

DECREE AND NOTICE OF APPEAL—July 17, 1940

Be it remembered, that on this 17th day of July, A. D. 1940, came on to be heard the above styled and numbered cause wherein E. R. Ritter, doing business as Ritter's Cafe is Plaintiff, and Carpenters and Joiners Union of America, Local No. 213, C. P. Driscoll, W. L. Thomas, Painters Local Union No. 130, Calus A. West and O. R. Smith, are defendants.

When came all parties by their attorneys of record and announced in open Court that all parties had agreed to waive the jury and submit the entire case to the Court.

[fol. 20] Thereupon the Court dismissed the jury and the hearing of said cause was proceeding with by all parties before the Court.

This Court, having heard the pleadings and evidence and being fully advised in the premises and the parties in open Court having agreed that the evidence shows that the fact findings as set out by Judge George W. Graves in the opinion of the Court of Civil Appeals for the First Supreme Judicial District of Texas, upon a former appeal of this cause, being cause No. 11,026, on the docket of said Court of Appeals, are the true facts in this case, is of the opinion that judgment should be rendered herein perpetuating the temporary injunction heretofore granted herein and denying the recovery of all damages.

Now therefore, it is considered by the Court and so ordered, adjudged and decreed, that the Defendants and each of them and all members of each of said Local Unions be permanently enjoined from picketing or causing to be picketed, Plaintiff E. R. Ritter's place of business at 418 Broadway Street, Houston, Texas, and from carrying banners peacefully and in any other manner upon the sidewalks in front of 418 Broadway Street with the words and inscriptions thereon as set forth in the said Court of Appeals' findings of fact hereinbefore referred to and with any other words or inscriptions thereon.

It is further ordered, adjudged and decreed by this Court that other relief not expressly granted herein is hereby denied.

All costs of this Court are taxed against Defendants.

For all of which let injunction writs, executions and other writs issue necessary to enforce this decree.

To which judgment, action and decree, of this Court the Defendants in open Court duly excepted and gave notice of Appeal to the Court of Civil Appeals for the First Supreme Judicial District of Texas at Galveston, Texas.

Ewing Boyd, Judge.

[File endorsement omitted.]

[fol. 21] In District Court of Harris County

[Title omitted]

Findings of Fact and Conclusions of Law—Filed July 31, 1940

In response to request of Plaintiffs, and each of them, in the above entitled and numbered cause, I make and find

the following as my Findings of Fact and Conclusions of Law therein:

Findings of Fact

I

That the plaintiff, E. R. Ritter, at all times material hereto, owned and operated Ritter's Cafe, located at 418 Broadway, in the City of Houston, Harris County, Texas, and that said Ritter was at such times and is engaged in the cafe and restaurant business in the sale and dispensation of cooked foodstuffs and other incidental commodities, usually and generally offered for sale to the general public by similar cafes and restaurants.

II

That in the operation of said restaurant and cafe plaintiff Ritter, at all times material hereto, and for some three years prior thereto, employed as cooks, waiters, and waitresses only members in good standing with Hotel and Restaurant Employees International Alliance, Local No. 808.

III

That Plaintiff Ritter, in the conduct and operation of said restaurant and cafe, at all times material hereto, had no bona fide labor-dispute with his said employees, as to working conditions, hours of employment or wages, and that plaintiff had no dispute with said union.

IV

That said Local No. 808 is the only organization having jurisdiction over plaintiffs' said employees.

V

That on or about November 4, 1939, plaintiff Ritter entered into a written agreement with one W. A. Plaster, a contractor, whereby the latter was to construct and erect [fol. 22] a building for said Ritter, in the 2800 block on Broadway, which is twenty-four (24) blocks removed from plaintiffs' said cafe, being some mile and a half therefrom.

VI

That the business-agents of defendant-unions called upon plaintiff and asked that a provision be inserted in said con-

tract requiring the contractor to use union labor on said job.

VII

That shortly after the said Plaster began erecting said building defendants Carpenters and Joiners Local No. 213, and Painters Local No. 130, by and through and upon the advice of their duly authorized officers and representatives, and by agreement between them, began a picketing campaign against plaintiff and his cafe, by having a member of one of said unions walk back and forth on the sidewalk in front of plaintiff's said cafe, and at no other place, carrying a sign or placard bearing the following inscription, or words to this effect:

"This Place is Unfair to Carpenters and Joiners Union of America, Local No. 213, and Painters Local No. 130, Affiliated with American Federation of Labor."

VIII

That plaintiff at all times material hereto, and for a long time prior theretofore, had employed no carpenters or painters at his said cafe.

IX

That no building was under construction at 418 Broadway at all times material hereto, nor was any painting being done there.

X

That said Local No. 213 and said Local No. 130 had no dispute with plaintiff concerning, in any manner, the conduct and operation of plaintiff's cafe at 418 Broadway.

XI

That no representative of either said Local No. 213 or said Local No. 130, had called upon the said contractor Plaster to request said Plaster or to urge him to use only members of said defendant-locals in the construction of said building in the 2800 block on Broadway.

[fol. 23]

XII

That shortly after plaintiffs filed suit for injunctive relief, the defendants, acting jointly and in pursuance of the

agreement between them, changed or had changed the wording or inscription on the banner or placard being carried by the picket to the following, or words to this effect:

"The Owner of This Cafe Has Awarded a Contract to Erect a Building to W. A. Plaster Who is Unfair to the Carpenters Unions 213 and Painter Union 130, Affiliated with the American Federation of Labor".

XIII

That the said contractor Plaster had no contract with either of the defendant unions and that no dispute existed, at all times material hereto, between said Plaster any *any* of his employees engaged in erecting said building.

XIV

That no employee of Ritter's Cafe and E. R. Ritter, and no employee of W. A. Plaster is on strike.

XV

That the purpose of picketing plaintiff's cafe at 418 Broadway is for the avowed purpose of forcing and compelling plaintiff to require the said contractor, Plaster, to use and employ only members of the defendant unions on the building under construction in the 2800 block on Broadway.

XVI

That plaintiff's damage is not ascertainable, and for that reason such relief is denied.

XVII

That plaintiff's employees, members of said Local 808, quit plaintiff's employ on the day the picket-line was established after a telephone call from the Secretary of said Local 808, and had not returned at the time of the hearing herein.

XVIII

That said Local No. 808 withdrew from plaintiff's cafe it- union card after said picketing began.

[fols. 24-25]

XIX

That the further effect of said picketing has been to make it impossible for plaintiff to have deliveries made to his

cafe by truck-drivers, members of unions not connected with this law suit, of food-stuffs and other commodities necessary to the orderly conduct of his business.

XX

That the further effect of said picketing is to prevent members of all trades-unions from patronizing plaintiff's cafe and to erect a barrier around plaintiff's cafe, across which no member of defendant-unions or any affiliate will go.

XXI

That no violence attended the said picketing of plaintiff's cafe.

Conclusions of Law

I

That plaintiff is engaged in a lawful enterprise in a lawful manner in the operation of his cafe and restaurant.

II

That the picketing at 418 Broadway constitutes an unlawful invasion of Plaintiff's right to conduct a legitimate enterprise and an attempt to interfere illegally with plaintiff's right to contract with third parties.

III

That said picketing, being illegal and for an unlawful purpose, should be restrained.

Ewing Boyd, Judge, 55th Judicial District of Texas.

[File endorsement omitted.]

[fol. 26] Cost bond on Appeal for $300 approved Aug. 2, 1940, and filed Aug. 2, 1940, omitted in printing.

Bill of Costs Omitted in Printing

[fol. 27] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 27a] [Caption omitted]

[fol. 28] IN THE COURT OF CIVIL APPEALS

[Title omitted]

EXCERPTS FROM APPELLANT'S BRIEF, PAGES 1-10—Filed December 14, 1940

Statement of the Nature and Result of the Suit

Appellees Ritter's Cafe and E. R. Ritter filed suit in the District Court of Harris County, Texas, against appellants seeking a temporary and permanent injunction enjoining and restraining appellants from doing a number of acts and things as set forth in the prayer of Appellees' Petition. The Petition of Appellees appears on Pages 2 to 14, inclusive of the Transcript. The prayer of said Petition appearing on pages 13 and 14 of the Transcript.

The trial on the merits of this cause was held on the 17th day of July, 1940, (Tr. pp. 19 and 20) before the Court and without a jury.

After the hearing of said cause on the trial on the merits, [fol. 29] the trial court entered its decree thereon permanently enjoining the appellants from picketing or causing to be picketed, Plaintiff E. R. Ritter's place of business at 418 Broadway in Houston, Texas and from carrying banners peacefully and in any other manner upon the sidewalks in front of 418 Broadway Street with the words and inscriptions thereon as set forth in the Court of Civil Appeals findings of fact (cause No. 11,026) and with any other words or inscriptions thereon (Tr. p. 20). Appellants, who were Defendants in the trial court, excepted to said judgment and decree and gave notice of appeal to the Court of Civil Appeals for the First Supreme Judicial District of Texas, at Galveston (Tr. pp. 20 and 21).

Thereafter on July 31st, 1940, in response to Plaintiffs' request, the trial court filed its findings — fact and conclusions of law (Tr. pp. 21 to 25).

On August 2nd, 1940, the Appellants filed their appeal bond and this bond was on the same day approved and filed by the Clerk of the District Court (Tr. pp. 25 to 27A).

The Transcript and Statement of Facts was filed in this Court on August 9, 1940.

The following are Appellants' Assignments of Error in this cause.

First Assignment of Error

The undisputed evidence in this case shows that Appellants have only exercised the right of free speech and freedom of the press guaranteed to them by the Constitution of the United States and the trial court erred in enjoining and restraining Appellants from the exercise of this right and privilege.

Second Assignment of Error

The trial court erred in enjoining and restraining Appellants from having one of their members to carry a placard in a peaceful manner upon a public sidewalk of the City of Houston, having inscribed thereon a truthful statement, and at least ten feet distance from Appellees' place of business bearing the following inscription:

"The owner of this cafe has awarded a contract to erect a building to W. A. Plaster who is unfair to the Carpenters Union 213 and Painters Union 130, Affiliated with the American Federation of Labor."

[fol. 30] Third Assignment of Error

The acts of Appellants in having one of their members carry said placard in a peaceful manner upon a public sidewalk of the City of Houston and at least ten feet from Appellees' place of business, is a right and privilege guaranteed to these appellants by the Constitution of the United States, and the trial court erred in enjoining and restraining such acts.

Fourth Assignment of Error

The trial court erred in construing the acts of Appellants in having one of their members carry said placard upon a public sidewalk of the City of Houston in a peaceful manner and at least ten feet distance from Appellees place of business, as unlawful picketing and in enjoining and restrain-g such acts.

Fifth Assignment of Error

Members of a union may, without statutory authorization by a state, make known the facts of a labor dispute, for freedom of speech is guaranteed by the United States Constitution.

Sixth Assignment of Error

No Statute, such as Articles 5152 to 5154, Revised Statutes of Texas, are necessary to Appellants' enjoyment and exercise of constitutional rights and privileges guaranteed under the United States Constitution.

Seventh Assignment of Error

A member of Appellants' union carrying such placard in the manner and at the times and places and under the conditions, as shown by the undisputed evidence, were exercising a right guaranteed to them by the United States Constitution and no statute of Texas can abridge or diminish the effective exercise of these rights to the extent of preventing truthful publicizing of the facts involved in this controversy.

Statement Under First Assignment of Error

The Appellee, Ritter, testified as follows in referring to the member of Appellants' union carrying the Placard:

[fol. 31] "Q. When did the next one appear?

A. Last Friday a week ago.

Q. Now state whether or not you observed any change in the inscription on the placard when he appeared the second time?

A. There was a change.

Q. In what respect?

A. Well, in the writing on the placard.

Q. Will you let us have that please?

A. 'The owner of this cafe has awarded a contract to W. A. Plaster who is unfair to Carpenters Local and Painters Local Affiliated with the American Federation of Labor.'" (S. F. p. 66.)

Appellee Ritter further testified:

"Q. I wish you would tell the Court approximately as best you can in what manner they parade up and down in front of your place of business at 418 Broadway?

A. They walk along the frontage of the building back and forth.

Q. With reference to the entrance to the place of business and the curb, where do they walk?

A. On the outer edge of what is termed the sidewalk.

Q. That is where the public in general walk to and fro?
A. Yes Sir." (S. F. p. 75.)

Appellee Ritter further testified:

"Q. How wide is this sidewalk where they walk, Mr. Ritter, where the pickets walk?
A. I suppose the regular width; I guess about eight or ten feet.
Q. And they walk at the outer edge of it, you say?
A. That's right.
Q. Well what do you mean by the outer edge of the sidewalk?
A. Well I would say ten feet from the entrance to the door.
Q. Now that is all they do, as I understand you, they come there in the morning taking this placard with the inscrip-
[fol. 32] tion on it and walk up and down on the sidewalk, at the outer edge of the sidewalk until you close at night, is that correct?
A. Yes Sir.
Q. Do they have more than one there at a time?
A. Just one." (S. F. p. 76.)

CAMPBELL OVERSTREET, called to the witness stand by appellees, testified as follows:

"Q. Now Mr. Overstreet, what are his instructions with reference to what he shall do out there?
A. Just carry that sign backwards and forwards.
Q. What are his instructions about being peaceful and staying off of properties either owned or leased by Mr. Ritter?
A. He was instructed to remain on public property and not enter into conversation with anybody or have any arguments with anybody pertaining to what he was doing and to be peaceful and law abiding at all times.
Q. Stay out on the sidewalk?
A. Yes Sir.
Q. Now, the number of times you have been out there, is that what has been going on?
A. Yes Sir.
Q. Is that all you want him to do in the future and expect him to do in the future?

A. That is the instructions and that is what we expect them to carry out.

Q. If he does anything besides that what will you do with reference to him?

A. Withdraw him and take him off.

Q. And will you put somebody else out there who will carry out instructions.

A. Yes Sir." (S. F. Pp. 22 and 23.)

For several weeks prior to the time this suit was filed there was no person carrying a placard in or near Ap-[fol. 33] pellees' place of business. (S. F. Pp. 48, 49 and 50.)

That after this suit was filed, Appellants had one of their members begin carrying a placard with the inscription thereon as follows:

"The owner of this cafe has awarded a contract to erect a building to W. A. Plaster who is unfair to the Carpenters Union 213 and Painters Union 130, Affiliated with the American Federation of Labor." (S. F. p. 66.)

That prior to the time this suit was filed, appellants attempted to induce Ritter and Plaster to employ their members on the Ritter construction job and he refused. (S. F. pp. 13 through 17.)

There has been no violence in connection with Appellants' acts and the trial judge so finds in Section 21 of his fact findings. (Tr. p. 25.)

PRAYER TO APPELLANTS' BRIEF APPEARING ON PAGE 30 THEREOF

We therefore respectfully pray that the trial court erred in its decision in this case and by its judgment the constitutional guarantees of Appellants under the United States Constitution have been illegally abridged.

Appellants Respectfully Pray that the judgment of the trial court be reversed and that judgment be here rendered in Appellants' favor.

Respectfully submitted, (S.) Sewall Myer, Frank Campbell Fourmy, Attorneys for Appellants.

[File endorsement omitted]

[fol. 34] IN THE COURT OF CIVIL APPEALS

Tr. Ct. #B-262,569

CARPENTERS AND JOINERS UNION OF AMERICA LOCAL NO. 213, et al.,

vs.

RITTER'S CAFE et al.

Appeal from District Court of Harris County

Opinion Delivered by Chief Justice Monteith

JUDGMENT—February 6, 1941

This cause came on to be heard on the transcript of the record and the same being inspected, because it is the opinion of this Court that there was no error in the judgment, it is therefore considered, adjudged and ordered that the judgment of the Court below be in all things affirmed; that the appellants, Carpenters and Joiners Union of America, Local No. 213, C. P. Driscoll, W. L. Thomas, Painters Local Union No. 130, Calus A. West and O. R. Smith, jointly and severally, and their surety, National Surety Corporation, pay all costs in this cause incurred. It is further ordered that this decision be certified below for observance.

[File endorsement omitted.]

IN THE COURT OF CIVIL APPEALS

[Title omitted]

OPINION—Filed February 6, 1941

This is an appeal from a judgment of the District Court of Harris County granting an application of appellees, Ritter's Cafe and E. R. Ritter, for a permanent injunction restraining appellants, Carpenters and Joiners Union of America, Local No. 213, and Painters Local Union No. 130, and their members, from picketing or causing to be picketed, and from carrying certain banners and placards upon the

sidewalks in front of appellees' place of business at 418 Broadway in Houston, Texas.

Appellants answered by general demurrer, general denial and exceptions. They admitted that they had peacefully picketed appellees' place of business, but contended that, in [fol. 35] doing so, they were exercising their rights of free speech and freedom of the press and that any judgment enjoining them from exercising such rights would be a violation and abridgement of their rights under the Fourteenth Amendment to the Constitution of the United States and Section 8 of the Bill of Rights of the State of Texas.

This is the second appeal to this court in this action. The first appeal, which is reported under the same title in Volume 138 S. W. (2), 223, was from an order of the district court of Harris County temporarily enjoining appellants herein from the carrying of the placards complained of and from picketing appellees' place of business. Appellants then, as in this appeal, contended that any action by the court abridging their rights of expressing their views by means of placards on the public sidewalks and from picketing appellees' place of business would constitute an abridgment of their right of free speech.

This appeal involves the right of a court of equity to permanently enjoin a labor organization from picketing and from expressing their views upon a situation affecting themselves by means of banners and placards on the sidewalk in front of an establishment with which they have no labor dispute and where it is proven that such actions are injurious and prejudicial to the business and property rights of the complaining parties.

Upon a hearing of appellees' evidence—no evidence was offered by appellants—it was agreed by the parties that the fact findings, as set out in the opinion of this court in the first appeal herein, were the true facts in the case. On the request of appellees for findings of fact the trial court filed said findings as his findings of fact and conclusions of law. They are as follows:

"Findings of Fact

"(1) That the plaintiff E. R. Ritter, at all times material hereto, owned and operated Ritter's Cafe, located at 418 Broadway, in the City of Houston, Harris County, Texas, and that said Ritter was at such times and is engaged in the

cafe and restaurant business in the sale and dispensation of cooked foodstuffs and other incidental commodities, [fol. 36] usually and generally offered for sale to the general public by similar cafes and restaurants.

"(2) That in the operation of said restaurant and cafe plaintiff Ritter, at all times material hereto, and for some three years prior thereto, employed as cooks, waiters, and waitresses only members in good standing with Hotel and Restaurant Employees International Alliance, Local No. 808.

"(3) That plaintiff Ritter, in the conduct and operation of said restaurant and cafe, at all times material hereto, had no bona fide labor-dispute with his said employees, as to working conditions, hours of employment or wages, and that plaintiff had no dispute with said union.

"(4) That said Local No. 808 is the only organization having jurisdiction over plaintiffs' said employees.

"(5) That on or about November 4, 1939, plaintiff Ritter entered into a written agreement with one W. A. Plaster, a contractor whereby the latter was to construct and erect a building for said Ritter in the 2800 block on Broadway, which is twenty-four (24) blocks removed from plaintiffs' said cafe, being some mile and a half therefrom.

"(6) That the business-agents of defendant-unions called upon plaintiff and asked that a provision be inserted in said contract requiring the contractor to use union labor on said job.

"(7) That shortly after the said Plaster began erecting said building defendants Carpenters and Joiners Local No. 213, and Painters Local No. 130, by and through and upon the advice of their duly authorized officers and representatives, and by agreement between them, began a picketing campaign against plaintiff and his cafe, by having a member of one of said unions walk back and forth on the sidewalk in front of plaintiffs' said cafe, and at no other place, carrying a sign or placard bearing the following inscription, or words to this effect:

"This place is Unfair to Carpenters and Joiners Union of America, Local No. 213, and Painters Local No. 130, Affiliated With American Federation of Labor."

"(8) That plaintiff at all times material hereto, and for a long time prior theretofore, had employed no carpenters or painters at his cafe.

[fol. 37] "(9) That no building was under construction at 418 Broadway at all times material hereto, nor was any painting being done there.

"(10) That said Local No. 213 and said Local No. 130 had no dispute with plaintiff concerning, in any manner, the conduct and operation of plaintiff's cafe at 418 Broadway.

"(11) That no representative of either of said Local No. 213 or said Local No. 130, had called upon the said contractor Plaster to request said Plaster or to urge him to use only members of said defendant locals in the construction of said building in the 2800 block on Broadway.

"(12) That shortly after plaintiffs filed suit for injunctive relief, the defendants, acting jointly and in pursuance of the agreement between them, changed or had changed the wording or inscription on the banner or placard being carried by the picket to the following words, or words to this effect:

"The Owner of This Cafe Has Awarded a Contract to Erect a Building to W. A. Plaster Who is Unfair to the Carpenters Union 213 and Painter Union 130, Affiliated With the American Federation of Labor."

"(13) That the said contractor Plaster had no contract with either of the defendant unions and that no dispute existed, at all times material hereto, between said Plaster and any of his employees engaged in erecting said building.

"(14) That no employee of Ritter's Cafe and E. R. Ritter, and no employee of W. A. Plaster is on strike.

"(15) That the purpose of picketing plaintiff's cafe at 418 Broadway is for the avowed purpose of forcing and compelling plaintiff to require the said contractor, Plaster, to use and employ only members of the defendant unions on the building under construction in the 2800 block on Broadway.

"(16) That plaintiff's receipts at his said cafe and restaurant were some sixty (60%) per cent less while said picketing continued than theretofore.

"(17) That plaintiff's employees, members of said Local 808, quit plaintiff's employ on the day the picket-line was [fol. 38] established after a telephone call from the Secretary of said Local No. 808, and had not returned at the time of the hearing herein.

"(18) That said Local No. 808 withdrew from plaintiff's cafe its union card after said picketing began.

"(19) That the further effect of said picketing has been to make it impossible for plaintiff to have deliveries made to his cafe by truck-drivers, members of unions not connected with this law suit, of foodsfuffs and other commodities necessary to the orderly conduct of his business.

"(20) That the further effect of said picketing is to prevent members of all trades-unions from patronizing plaintiff's cafe and to erect a barrier around plaintiff's cafe, across which no member of defendant unions or an affiliate will go.

"(21) That no violence attended the said picketing of plaintiff's cafe.

"(22) That defendants and each of them will continue to picket plaintiff's said cafe unless restrained by order of this Court.

"Conclusions of Law

"(1) That plaintiff is engaged in a lawful enterprise in a lawful manner in the operation of his cafe and restaurant.

"(2) That the picketing at 418 Broadway constitutes an unlawful invasion of plaintiff's right to conduct a legitimate enterprise and an attempt to interfere illegally with plaintiff's right to contract with third parties.

"(3) That said picketing, being illegal and for an unlawful purpose, should be restrained."

Article 5152, Revised Statutes of 1925, provides that it shall be lawful for any and all persons engaged in any kind of work or labor to associate themselves together and to form trade unions and other organizations for the purpose of protecting themselves in their respective pursuits and employments.

Article 5153 provides that it shall be lawful for any member of such trade union or other organization to induce or

to attempt to induce, by peaceful and lawful means, any person to accept any particular employment or to enter or [fol. 39] refuse to enter or relinquish any employment or pursuit in which such person may be engaged, but that such member or members shall not have the right to invade or trespass upon the premises of another without the consent of the owner thereof.

Article 4642, Section 1, Revised Statutes of 1925, provides for injunctive relief "Where the applicant is entitled to the relief demanded and such relief, or any part thereof, requires the restraint of some act prejudicial to him."

It is the established law in this state that where a case has been tried without a jury and there was ample evidence in the record to support the findings of the trial court, such findings have the same force and effect as a verdict of the jury on the facts found, and a reviewing court must affirm the trial court's judgment in the absence of other substantial error. O'Connell v. Johnson, 122 S. W. (2), 649, (error refused); New Amsterdam Casualty Co. v. First National Bank, 134 S. W. (2), 470; Guerrero v. U. S. F. & G. Co., 101 S. W. (2), 592; 3 Tex. Jur., pp. 1104, 1125, 1143.

In the instant case there is not only no challenge by appellants of the facts on which the trial court based his judgment, but there was an agreement by the parties that the facts found by the court were the true facts of the case.

While our courts, in construing Articles 5152 to 5154, inclusive, which involve the rights and privileges of "Labor Organizations", have uniformly upheld their right to organize and have legalized the right of picketing with the limited objective of allowing striking employees who have a bona fide dispute with their employer, to induce, by peaceful and lawful means, any person to accept any particular employment or to enter or refuse to enter or relinquish any employment or pursuit in which such person may be engaged, a court of equity will, in proper cases affecting labor organizations, grant injunctions where relief is necessary for the preservation of a business or other property rights. Carter v. Bradshaw, 138 S. W. (2), 187; Gibraltar Savings & Building Ass'n et al. v. Isbel et al., 10 S. W. (2), 1029; Walker et al. v. Fort Worth Ins. Underwriters et al., 79 S. W. (2), 661.

[fol. 40] In this case the trial court based his judgment on the facts that there had been no bona fide labor dispute of any kind between appellee Ritter and his employees, all of

whom were members of a union; that he had employed no carpenters or painters in his cafe, and that neither of appellant unions had any dispute with him concerning the conduct and operation of his cafe at 418 Broadway; that appellee had sustained a substantial loss in the earnings of said establishment in that its receipts were some 60% less during said picketing than theretofore; that his employees had quit his employ the day said picket line was established and that said picketing had made it impossible to have deliveries made thereto of foodstuffs and other necessary commodities by truck drivers who were members of other unions, and that the actions of appellants had prevented the members of all trades unions from patronizing his cafe and had in effect erected a barrier around it across which no member of appellant unions or any of their affiliates would go.

It follows that under the above authorities appellants' acts were prejudicial to the rights of appellees to such an extent as to authorize the intervention of a court of equity for the purpose of preserving such rights.

As stated by this court, speaking through Justice Graves, in the first appeal herein, Carpenters and Joiners Union et al. v. Ritter's Cafe, 138 S. W. (2), 223:

"• • • no right of free speech under the fundamental law of either nation or state is transcended by an injunction restraining the picketing of a place of business by persons (whether members of a labor organization or union or not) who seek to prevent the public from trading with the picketed place or to compel its owner to break a contract which he has with some disassociated third person." (Carpenters and Joiners Union, etc., v. Ritter's Cafe, supra; Webb v. Cooks Union, 205 S. W. 65; Waiters and Waitresses Union v. Papageorge, 230 S. W. 1086; Texas Motion Picture & Vitaphone Operators, etc. v. Galveston Motion Picture Operators, 132 S. W. 299.)

"• • • the right of free speech is limited by the constitutional rights of others to acquire and possess property, [fol. 41] an instance of which is the right to carry on a business in a lawful way. It has been said that it does not follow that because a single individual may under the constitutional guaranty freely speak and write as he pleases without injunctive restraint, an association or combination of persons may lawfully do likewise, as, in such cases, the views ex-

pressed are not merely those of the individual, but the express concerted will and desire of a powerful organization." See Oakes on Organized Labor, 1917 Ed., page 384, Section 880.

"These appellants have no legal grievance merely because the appellees refused to abrogate a private contract they had with W. A. Plaster to which the appellants were neither parties nor in privity; furthermore, they being such strangers thereto, but at the same time having full knowledge thereof, and of the business being conducted between themselves by the parties thereto, they, as such interlopers, not only would have laid themselves liable in damages to a party thereto for having knowingly induced a breach thereof, had that occurred as a result of their acts (Raymond v. Yarrington, 96 Tex. 443, 72 S. W. 580, 73 S. W. 809, 62 L. R. A. 962, 97 Am. St. Rep. 914, and Brown Hardware Co. v. Indiana Stove Works, 96 Tex. 453, 73 S. W. 800), but did in fact subject themselves to the power of a court of equity in this proceeding to protect the appellees against such an unwarranted interference with their peaceful contractual relationship with Mr. Plaster; especially so since obviously no remedy at law would have been adequate, and irreparable injury would probably have resulted, had the interference been permitted to continue. Henke & Pillot v. Amalgamated Meat Cutters, 109 S. W. (2), at page 1085, par. 3, and cited authorities."

A careful analysis of the authorities cited by appellants convinces us that the holdings relied on therein have no practical application to the facts in the instant case. It follows from these conclusions that the judgment of the trial court should be in all things affirmed; it will be so ordered.

Affirmed.

(S.) W. E. Monteith, Chief Justice.

[fol. 42] [File endorsement omitted.]

IN THE COURT OF CIVIL APPEALS

[Title omitted]

APPELLANTS' MOTION FOR REHEARING—Filed February 18, 1941

To the Honorable Judges of said Court:

Come now Appellants in the above styled and numbered cause and move the Court to set aside the decision hereto-

fore rendered by this Court in this cause on the 6th day of February, A. D. 1941, and to grant a rehearing herein and for cause say:

Preliminary Statement

Since the decision was rendered by this Court in this cause on February 6th, 1941, the Supreme Court of the United States has rendered its decision in the American Federation of Labor v. Swing Case from Illinois upholding the exact contentions of Appellants in this case.

The Supreme Court of the United States, in the Swing Case (Decided February 10, 1941) has held exactly contrary to this Court's decision in this case and has swept from beneath this Court's decision every semblance of justification for your decision.

Among the propositions decided in the Swing case, favorable to our contentions herein, is the right of a labor union under the guarantees of the United States Constitution, to picket peaceably a person's place of business even though there does not exist a labor dispute between an employer and employees.

[fol. 43] The Swing case decision denies to State Legislatures and to State Courts the right to prevent peaceful picketing under any circumstances.

Since Appellants are urging, in the case at bar, these same identical contentions this Court, we feel sure, will follow this most recent expression of the United States Supreme Court upon these same questions.

In each of the opinions heretofore written by this Court you have sought to distinguish prior United States Supreme Court decisions by saying that no bona fide labor dispute under Articles 5152, Revised Statutes of Texas, 1925, existed between an employer and his employees.

Appellants are not now and have never asserted any rights under Articles 5152, et seq., Revised Statutes of Texas and we contend these Statutes have no bearing upon appellants' rights since Appellants rely upon the United States Constitutional guarantees.

These United States Constitutional guarantees are not dependent upon any Texas Statutes.

To the contrary, if a Texas Statute abridges these United States Constitutional guarantees, such state statutes are void.

The Swing Case decides each and all of these questions in favor of our contentions and they are no longer open questions in Texas.

In view of this situation these United States Supreme Court decisions cannot be brushed aside by merely stating that "they have no practical application to the facts in the instant case."

We therefore urge this Court to give this changed but present situation your most earnest attention.

Excerpts from the Swing Case will be copied later in this Motion.

I

This Court erred in holding in effect that members of a labor union have no legal right to carry upon a public sidewalk in front of Appellee's place of business, in a peaceful manner, a placard having inscribed thereon a true statement [fol. 44] advising the public of a situation or condition of affairs which affects the labor union and in which the Appellants have an interest.

II

This Court erred in overruling and not sustaining Appellants' contentions upon this appeal, that a member of Appellants' union has a right to carry upon a public sidewalk in front of Appellee's restaurant, in a peaceful manner, a placard having inscribed thereon a true statement advising the public of a situation or condition of affairs — which Appellants have an interest.

III

This Court erred in holding that the Fourteenth Amendment to the Constitution of the United States, did not protect Appellants in thus publicizing the facts connected with this situation existing between Appellees and Appellants.

IV

This Court erred in holding that "no right of free speech under the fundamental law of either nation or state is transcended by an injunction restraining the picketing of a place of business by persons (whether members of a labor combination or union or not) who seek to prevent the public from trading with the picketed place or to compel its

owner to break a contract which he has with some such disassociated third person," since this holding is in direct conflict with and contrary to the decisions of the Supreme Court of the United States upholding the constitutional right of labor unions, guaranteed to them by the United States Constitution, to truthfully publicize the facts of any situation, affecting labor and existing between the owner of the place picketed and the union "in protecting the interests of its members against the harmful effect upon them of Appellees' actions." (Senn case opinion). And this is the law under the Swing decision, regardless of the existence or non-existence of a labor dispute between an employer and his employees.

V

This Court erred in holding that "the right of free speech is limited by the constitutional rights of others to acquire and possess property, an instance of which is the right to [fol. 45] carry on a business in a lawful way," since this holding is in direct conflict with and contrary to the decisions of the Supreme Court of the United States upholding the constitutional right of labor unions, guaranteed to them by the United States Constitution, to truthfully publicize the facts of any situation affecting labor and existing between the owner of the place picketed and the union "in protecting the interests of the members against the harmful effect upon them of Appellees' actions," and especially since the United States Supreme Court has held (Thornhill v. Alabama) that such facts must be regarded as within that area of free discussion guaranteed by the United States Constitution, and that satisfactory hours, wages, etc., "have an importance which is not less than the interests of those in the business or industry directly concerned."

This is now the law under the Swing decision regardless of the existence or non-existence of a labor dispute between an employer and his employees.

VI

This Court erred in its decision because you expressly state in your opinion that you are sustaining the trial court's decision since such trial court "based his judgment on the facts that there had been no bona fide labor dispute of any kind between Ritter (Appellee) and his employees," since this holding is in direct conflict with and contrary to the

decisions of the Supreme Court of the United States and more especially the very recent decision in the Swing case, which expressly holds that the existence of a labor dispute between an employer and his employees is not essential to the constitutional right of Appellants to publicize in a peaceable manner by the use of placards carried upon the public sidewalks, the true facts about such situation.

VII

This Court erred in its decision of this cause in giving controlling effect to state statutes and decisions based upon such state statutes for the reason that appellants base their rights herein upon the guarantees of the United States Constitution and not upon any state statutes of decisions.

[fol. 46]

VIII

This Court erred in basing its decision upon the insubstantial fact findings of the trial court and ignoring that part of the record and findings which indisputedly shows that Appellants were only peaceably publicizing the true facts of the situation existing between Appellants and Appellees by having one of Appellants' members carry a placard on a public sidewalk containing a true statement of the facts involved. This Court erred in this particular for the reason that the Supreme Court of the United States has recently held that no constitutional freedom, guaranteed by the Federal Constitution and least of all the guarantees of the Bill of Rights, can be defeated by insubstantial findings of fact screening reality. The Courts, and more especially the Supreme Court of the United States, have the ultimate power to search the records of state courts to determine these matters where a claim of constitutionality under the United States Constitution is effectively made. (Milk Drivers Union v. Meadowmoor Dairies, Inc. decided by the United States Supreme Court, February 10th, 1941 and reported in United States Law Week of February 11th, 1941).

AUTHORITIES

American Federation of Labor, John Fitzpatrick, Chicago Federation of Labor, et al. v. Ross W. Swing, et al. (Decided February 10th, 1941, by the Supreme Court of the United States and appearing (reported) in United

States Law Week of Date February 11th, 1941, Volume 9, No. 33).

Milk Drivers Union v. Meadowmoor Dairies, et al. (Decided by the United States Supreme Court on February 10th, 1941 and appearing (reported) in United States Law Week of date February 11th, 1941).

Senn v. Tile Layers Protective Union, 57 S. Ct. Rep. 857.

Thornhill v. State of Alabama, 60 S. Ct. Rep. 756.

Snyder v. City of Milwaukee, 60 S. Ct. Rep. 146.

Tovell v. City of Griffin, 58 S. Ct. Rep. 666.

REMARKS (Omitted)

* * * * * * * *

In view of the now settled law on these questions we respectfully ask this Court to grant Appellants a rehearing [fol. 47] herein and that the judgment of this Court be that the judgment of the trial court be reversed and that judgment be rendered for Appellants denying to Appellees all injunctive and other relief.

Respectfully submitted, (S.) Sewall Myer, Frank Campbell Fourmy, Attorneys for Appellants.

Attorney for Appellees:

Mr. Bernard A. Golding,
Niels Esperson Building,
Houston, Texas.

The undersigned Bernard A. Golding and Vinson Elkins, Weems and Francis on this 17th day of February 1941 hereby waive service of a certified copy of this motion for Rehearing & acknowledge receipt of a copy hereof and agree that appellants may file the original & two copies of this motion for Rehearing in the Court of Civil Appeals for the First Supreme Judicial District at Galveston.

Dated Feb. 17th, 1941.

(S.) Bernard A. Golding, Vinson, Elkins, Weems & Francis, Attorneys for Appellees.

[File endorsement omitted.]

IN THE COURT OF CIVIL APPEALS

OPINION ON MOTION FOR REHEARING—Filed April 13, 1941

In their motion for rehearing appellants contend that their original contentions have been upheld by decisions

[fol. 48] rendered by the Supreme Court of the United States in the cases of American Federation of Labor et al. v. Swing, et al., 61 Sup. Ct. Rep., 568, and Milk Drivers Union of Chicago et al. v. Meadowmoor Dairies, Inc., 61 Sup. Ct. Rep., 522, both of which have been decided since our original opinion in this case was handed down.

From a careful analysis of the facts in each of the cases referred to, it is our conclusion that they do not require a reversal of our original opinion herein.

In the case of the American Federation of Labor v. Swing, the plaintiffs were Ross W. Swing, the owner of a beauty parlor, and his employees. Appellant Union attempted to secure a contract with the owner, and, while he was willing for his employees to join the union, he declined to compel them to do so. Thereupon the union picketed his place of business. The Supreme Court of the State of Illinois granted an injunction restraining said picketing for the sole reason that there was no employer-employee dispute between Swing and his employees. In Reversing the action of the Supreme Court of Illinois, the Court held that it would be improper to dispose of the case otherwise than on the face of the decree under review, which rested on the explicit avowal that peaceful persuasion was forbidden in that state because those who were enjoined were not in Swing's employ. The Supreme Court, speaking through Justice Frankfurter, said:

"We are asked to sustain a decree which for the purpose of this case asserts as the common law of the state that there can be no 'peaceful picketing or peaceful persuasion' in relation to any dispute between an employer and a trade union unless the employer's own employees are in controversy with him. * * * Such a ban of free communication is inconsistent with the guarantee of freedom of speech. * * * The right of free communication cannot therefore be mutilated by denying it to workers, in a dispute with an employer, even though they are not in his employ."

As we interpret the opinion, the Court held that, in the absence of criminal acts or other unlawful conduct under the statutes of a state, a union cannot be enjoined from [fol. 49] picketing—in the manner there undertaken—the place of business of an employer with whom it is seeking to contract for its members.

In the case of Milk Drivers Union of Chicago v. Meadowmoor Dairies, Inc., the Supreme Court of the United States affirmed a judgment of the Illinois Supreme Court directing that a permanent injunction be issued restraining the picketing of the retail outlets of the Meadowmoor Dairies. The dairy sold its products to vendors, who in turn sold them to retail outlets. A labor dispute between the dairy and the union resulted in the retail stores, with whom the union had no labor dispute, being picketed. Certain acts of violence took place during the controversy although the pickets were not guilty of acts of violence. The dairy sought an injunction restraining the picketing of said retail stores. The United States Supreme Court, in its opinion said:

"The question which thus emerges is whether a state can choose to authorize its courts to enjoin such acts of picketing, in themselves peaceful, when they are enmeshed with contemporary violent conduct which is concededly outlawed. * * * But utterance in a context of violence can lose its significance as an appeal to reason and become part of an instrument of force. Such utterances are not meant to be sheltered by the constitution. A state may withdraw the injunction from labor controversies but no less certainly the Fourteenth Amendment does not make unconstitutional the use of an injunction as a means of restricting violence. We find nothing in the Fourteenth Amendment that prevents a state, if it so chooses, from placing confidence in a chancellor's decree and compels it to rely exclusively upon a policeman's club. * * * We merely hold that in the circumstances of the record before us the injunction authorized by the Supreme Court of Illinois does not transgress its constitutional power. * * * But just as a state through its legislature may deal with specific circumstances menacing the peace of an appropriately drawn act, Norhill v. Alabama, supra, (310 U. S. 88), so the law of a state may be fitted to a concrete situation through the authority given by the state to its courts. This is precisely the kind of situation which the Norhill opinion excluded from its scope."

[fol. 50] In effect, the court in this case held that, under the constitution, the right of free speech is not unlimited but that, under a proper state of facts, state courts are vested with authority to enjoin picketing by a labor organization in protecting the rights of its citizens where such picketing is "enmeshed" with violence or where it involves such conduct as the state is authorized to declare unlawful

or the breach of such laws as are necessary for the protection and welfare of its residents.

Except in so far as their scope is limited by R. S. Articles 5152, 5153 and 5154, and article 1643 of the Penal Code, R. S. Articles 7426 and 7428 and Articles 1632, 1634 and 1635 of the Penal Code, which prohibit any attempt to create restrictions in the free pursuit of any business or any agreement or threat to boycott a person or association by a refusal to buy from or sell to him or it and to induce others to do so, are in full force and effect in this state.

In the instant case, appellants directed a picketing campaign against appellee with whom the union had no labor dispute and with whom it neither wished, nor was eligible, to contract in any way, for the purpose of forcing a settlement of a dispute between appellant union and W. A. Plaster. The unchallenged findings of the trial court show that the revenues from appellee's business decreased approximately 60% while said picketing continued. Under the facts herein, the only relief available to appellee is through a court of equity.

While the Supreme Court of the United States in the case of Milk Driver's Union of Chicago v. Meadowmoor Dairies, Inc., supra, held that picketing would be enjoined when enmeshed with violent conduct, it quoted with approval from its opinion in the case of Carson v. State of California, 310 U. S. 88, in which it is said: "The power and duty of the State to take adequate steps to preserve the peace and protect the privacy, the lives, and the property of its residents cannot be doubted."

It follows, we think, with equal force, that the Fourteenth Amendment of the Federal Constitution does not make un- [fol. 51] constitutional the use of an injunction as a means of preventing the violation of the Texas anti-trust laws, Articles 1632 et seq., the constitutionality of which have recently been sustained by the Supreme Court of the United States in the case if Tigner v. State of Texas, 310 U. S. 141, in an opinion handed down by Justice Frankfurter on May 6, 1940.

Appellants' motion for rehearing is overruled.

Overruled.

Cody, A. J., concurring.

(S.) W. E. Monteith, Chief Justice.

I concur in the refusal of the motion for rehearing. I base my concurrence, however, upon the view that the con-

stitutional right of free speech cannot be used to implement a boycott. The undisputed facts in this case disclosed a boycott.

(S.) T. H. Cody, Associate Justice.

[File endorsement omitted.]

IN THE COURT OF CIVIL APPEALS

[Title omitted]

ORDER REFUSING MOTION FOR REHEARING—April 3, 1941

Opinion on motion by Chief Justice Monteith.

It is ordered that appellants' motion for rehearing be refused.

[File endorsement omitted.]

IN THE SUPREME COURT OF TEXAS

May 21, 1941.

From Harris County, First District

App. No. 25660

CARPENTERS & JOINERS UNION OF AMERICA, LOCAL NO. 213, et al.

vs.

RITTER'S CAFE, et al.

[fol. 52] CERTIFIED COPY OF ORDER OF SUPREME COURT OF TEXAS REFUSING WRIT OF ERROR—May 21, 1941

(Filed in Court of Civil Appeals—June 9, 1941)

This day came on to be heard the application of plaintiffs in error for a writ of error to the Court of Civil Appeals for the First District and the same having been duly considered, it is ordered that the application be refused; that the applicants, Carpenters and Joiners Union of America, Local No. 213, C. P. Driscoll, W. L. Thomas, Painters Local No. 130, Calus A. West and O. R. Smith, and their

surety, National Surety Corporation, pay all costs incurred on this application.

I, S. A. Philquist, Clerk of the Supreme Court of Texas, hereby certify that the above is a true and correct copy of the judgment rendered by the Supreme Court of Texas on the application for writ of error styled and numbered as above on the docket of said Court.

Witness my hand and the seal of said Court, at the City of Austin, this the 6th day of June, A. D. 1941.

S. A. Philquist, Clerk, By (S.) Carl B. Lyda, Deputy.
(Seal.)

[File endorsement omitted.]

IN THE COURT OF CIVIL APPEALS

[Title omitted]

MOTION TO WITHHOLD MANDATE AND STAY JUDGMENT—Filed June 21, 1941

To the Honorable Judges of Said Court:

Come now the Appellants in the above numbered and styled cause and move this Court to enter its order instructing the Clerk of this Court to not issue at this time a mandate herein and that the judgment in this cause heretofore entered by this Court, be stayed pending the filing of a petition for Certiorari in the Supreme Court of the United States and that Court's action thereon, provided said Peti-
[fols. 53-54] tion be so filed within the time limit provided by the rules of that Court for the filing of said Petition for Certiorari.

These Appellants say that they are now proceeding with the preparation of said Petition for Certiorari, supporting briefs, etc.

Wherefore, the respectfully pray that this motion be granted and that said Order as hereinbefore requested be issued by this Court.

Respectfully submitted, (S.) Sewall Myer. (S.) Frank Campbell Fourmy, Attorneys for Appellants.

[File endorsement omitted.]

IN THE COURT OF CIVIL APPEALS

[Title omitted]

ORDER WITHHOLDING MANDATE AND STAYING JUDGMENT—July 2, 1941

It is ordered that appellants' motion to withhold issuance of mandate and to stay judgment of this Court pending their application to the Supreme Court of the United States for a writ of certiorari and that Court's action on their said application be and the same hereby is granted.

[File endorsement omitted.]

BILL OF COSTS OMITTED IN PRINTING

[fol. 55] IN THE COURT OF CIVIL APPEALS

[Title omitted]

PRAECIPE FOR TRANSCRIPT OF RECORD—Filed July 22, 1941

Honorable Harry Garrett, Clerk of the Court of Civil Appeals for the First Supreme Judicial District of Texas, Galveston, Texas.

DEAR SIR:

We will thank you to prepare forthwith a transcript of the record in the above entitled and numbered cause, for use by Appellants, Carpenters and Joiners Union of America, Local No. 213, Painters Local Union No. 130 and National Surety Corporation of New York, New York, the surety on the Appeal Bond in your Court in this cause, in presenting a Petition for Writ of Certiorari to the Supreme Court of the United States in said cause.

You will please include in said Transcript the following portions of the record:

(1) Praecipe

(2) Portions of the transcript by the Clerk of the District Court as follows:

(a) Index
(b) Caption
(c) Plaintiff's Original Petition
(d) Defendant's Original Answer
(e) Decree of trial court
(f) Trial Court's "Findings of Fact and Conclusions of Law"

(g) Appeal Bond
(h) Bill of Costs
(i) Clerk's Certificate.

(3) Portions of the Brief filed by Appellants, Carpenters and Joiners Union of America, Local No. 213, and Painters Local Union No. 130, in the Court of Civil Appeals, as follows:

(a) Caption
(b) Statement of Nature and Result of Suit
(c) First Assignment of Error (Submitted as a Proposition)
[fol. 56] (d) Second Assignment of Error (Submitted as a Proposition)
(e) Third Assignment of Error (Submitted as a Proposition)
(f) Fourth Assignment of Error (Submitted as a Proposition)
(g) Fifth Assignment of Error (Submitted as a Proposition)
(h) Sixth Assignment of Error (Submitted as a Proposition)
(i) Seventh Assignment of Error (Submitted as a Proposition)
(j) Statement under First Assignment of Error (Submitted as a Proposition)
(k) Prayer to Appellants' Brief.

(4) Judgment of the Court of Civil Appeals.
(5) Opinion of the Court of Civil Appeals.
(6) Appellants' Motion for rehearing in the Court of Civil Appeals omitting the "Remarks".
(7) Order overruling appellants' motion for a Rehearing in the Court of Civil Appeals.
(8) Written opinion of the Court of Appeals overruling Appellants' Motion for Rehearing.
(9) Portions of Appellants' Application for Writ of Error to the Supreme Court of Texas as follows:

(a) Caption
(b) Erroneous holdings of Court of Civil Appeals appearing on page 5 of said Application and being three in number.
(c) Grounds of Jurisdiction appearing on pages 11 to 17 of said Application.

(Clerk's Note: Paragraph "(9)" hereof has been omitted from this transcript pursuant to letter from Hon. Sewall Myer of date July 23, 1941)

(10) Order of the Supreme Court denying Petition for Writ of Error.

(11) Bill of Costs.

(12) Certificate.

Respectfully requested, (S.) Sewall Myer, Attorney for Petitioners.

For and in behalf of Ritter's Cafe and E. R. Ritter, each and all of the Appellees in the above entitled and numbered cause, we hereby acknowledge receipt of the Original and a copy of the above praecipe on this 17th day of July, 1941.

(S.) Bernard A. Golding. (S.) Vinson, Elkins, Weems & Francis, Attorneys for Appellees.

[File endorsement omitted.]

[fol. 57] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 58] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1941

No. 527

ORDER ALLOWING CERTIORARI—Filed October 13, 1941

The petition herein for a writ of certiorari to the Court of Civil Appeals of the State of Texas, First Supreme Judicial District, is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 527

CARPENTERS AND JOINERS UNION OF AMERICA, LOCAL NO. 213, ET AL.,

Petitioners.

vs.

RITTER'S CAFE, ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE FIRST SUPREME JUDICIAL DISTRICT OF TEXAS, AT GALVESTON.

SEWALL MYER,

Attorney for Petitioners.

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TABLE OF CASES CITED

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SUPREME COURT OF THE UNITED STATES

No. .....

CARPENTERS AND JOINERS UNION OF AMERICA, LOCAL NO. 213, ET AL.,

Petitioners.

vs.

RITTER'S CAFE, ET AL.

PETITION FOR CERTIORARI

To the Honorable Supreme Court of the United States:

The joint and several Petition of Carpenters and Joiners Union of America, Local No. 213, Painters Local No. 130, C. P. Driscoll, W. L. Thomas, Calus A. West and O. R. Smith and Natonal Surety Corporation of New York, New York, respectfully shows:

1. Respondents, Ritter's Cafe and E. R. Ritter sued and procured a permanent injunction against Petitioners, Carpenters and Joiners Union of America, Local No. 213, Painters Local Union No. 130, C. P. Driscoll, W. L. Thomas, Calus A. West and O. R. Smith, preventing Petitioners and the members of said Unions from picketing or causing to be picketed Ritter's Cafe and preventing a member of Petitioners' Union from peaceably carrying a placard upon a public sidewalk in the City of Houston, Texas, in front of Ritter's Cafe at 418 Broadway Street. Such placard had printed or painted the following truthful inscription:

"The owner of this Cafe has awarded a contract to erect a building to W. A. Plaster, who is unfair to the Carpenters Union 213, and Painters Union 130, affiliated with the American Federation of Labor."

2. Petitioners are labor unions holding charters under International Unions that are affiliated with the American Federation of Labor.

3. Petitioners, among other defenses, contended in their Original Answer (Or. R. 18) that a member of one or the other of Petitioners' unions was permitted and guaranteed the privilege under the rights and guarantees of the Constitution of the United States and especially the Fourteenth Amendment thereto and under the decisions of this Court construing the Federal Constitution to peaceably carry upon a public sidewalk in the City of Houston, Texas, in front of Ritter's Cafe, such placard with said truthful statement painted or printed thereon.

Petitioners further contended that a permanent injunction preventing this, amounted to an abridgement of Petitioners' right to peaceably communicate to the public the true facts involved in a labor dispute between Petitioners and Respondents.

4 The trial court held against Petitioners' contention and issued a permanent injunction which prevented Petitioners' member from so peaceably carrying said placard upon said public sidewalk.

5. The trial court made certain "Fact Findings" which all parties agreed were the true facts in the case. These "Fact Findings" are copied in the Opinion of the Court of Civil Appeals (Or. R. 35) and are briefly to the effect:

That Respondents conducted a Cafe at 418 Broadway

Street in Houston, Texas. That Ritter's Cafe employed members of an American Federation of Labor Union as cooks, waiters, etc., and had no bona fide labor dispute with his employees in the Cafe. That Ritter refused a request of the business agents of Petititoners to insert a union labor clause in a written contract Ritter was entering into with one W. A. Plaster, a contractor, to construct for him a building located about one and one-half miles from Ritter's Cafe. That shortly after Plaster began the construction of this building for Ritter, the Petitioners began picketing the cafe by having one member of the Petitioners' unions walk back and forth on the sidewalk in front of Ritter's Cafe, carrying a placard with an inscription thereon:

> "This place is unfair to Carpenters and Joiners Union of America Local 213 and Painters Local No. 130, Affiliated with American Federation of Labor."

Shortly after this suit was filed the inscription on the placard was changed to read:

> "The owner of this Cafe has awarded a contract to erect a building, to W. A. Plaster, who is unfair to Carpenters Union 213, and Painters Union 130, affiliated with the American Federation of Labor."

That Ritter employed no carpenters or painters at the Cafe and there was no building under construction at the location of the Cafe. Petitioners had no dispute with Ritter concerning the operation of the Cafe. That the representatives of Petitioners had not requested Plaster to employ their members upon this Ritter job. That Plaster had no contract with Petititoners' unions. That there existed no dispute between Plaster and his employees. That no employee of Ritter or Plaster was on a strike.

That the purpose of the picketing was to force Ritter to require Plaster to use and employ only members of Petitioners' unions in constructing the Ritter building.

That the receipts of the Cafe decreased about sixty per cent (60%) while the picketing continued. That Ritter's employees in the Cafe quit work when picketing began and did not return and Ritter's employees' union withdrew its union card from the Cafe. That truck drivers refused to deliver foodstuffs to the Cafe while the picketing continued. That other trades-union men refused to patronize or enter the Cafe while the picketing continued.

That there was no violence in connection with the picketing. The picketing was peaceable.

That the peaceable picketing would have continued unless restrained by the trial court.

6. Petitioners perfected their Appeal to the Court of Civil Appeals for the First Supreme Judicial District of Texas at Galveston and filed its appeal bond for costs (Or. R. 24) on which the Petitioner National Surety Corporation of New York, became surety (Or. R. 26).

7. The Court of Civil Appeals at Galveston, on February 6th, 1941, entered its judgment affirming the judgment of the trial court (Or. R. 34).

8. Petitioners filed in due time in the Court of Civil Appeals at Galveston their Motion for Rehearing (Or. R. 42).

9. Thereafter on the 3rd day of April, 1941, the Court of Civil Appeals at Galveston overruled Petitioners' Motion for Rehearing and filed its written opinion in support of its decision (Or. R. 47).

10. Thereafter and in due time, Petitioners filed their

Petition for Writ of Error to the Supreme Court of Texas, which is the State Court of last resort.

11. Thereafter on the 21st day of May, 1941, the Supreme Court of Texas, entered its order refusing Petitioners' Petition for Writ of Error (Or. R. 51) which under the Texas practice (Revised Statutes of Texas, 1925, Article 1746 and Article 1728, as amended Acts 40th Legislature, 1927, P. 214, Chapter 144, Section 1), indicated that the Supreme Court of Texas had refused to exercise its potential jurisdiction over the case because it was of the opinion that the judgment of the Court of Civil Appeals was a correct one. This final action so taken by the Supreme Court of Texas in this cause being less than three months before the filing of this Petition for Writ of Certiorari.

GROUNDS OF JURISDICTION OF SUPREME COURT OF THE UNITED STATES

This Court has jurisdiction of this Case for the reason that the Court of Civil Appeals for the First Supreme Judicial District of Texas, at Galveston, and the Supreme Court of Texas, by refusing a Petition for Writ of Error, as hereinbefore pointed out, has decided a federal question of substance in a way probably not in accord with the applicable decisions of this Court in the following particulars.

The judgment of the Court of Civil Appeals and the Order of the Supreme Court of Texas refusing the Petition for Writ of Error, has denied to Petitioners herein the right of free speech and freedom of the press guaranteed to them by the Constitution of the United States and especially by the Fourteenth Amendment thereto.

This Court, in several reecnt decisions, has decided that a labor union, under conditions practically identical with those that existed in this case, had the right and privilege under the guarantees and immunities of the United States Constitution, to do the acts and things which Petitioners were doing in this case and which are prohibited and forbidden to Petitioners by the judgments of the State Courts of Texas in this case.

This court also has jurisdiction of this case for the reason that it involves the proper construction of the First and Fourteenth Amendment to the Constitution of the United States.

This Court also has jurisdiction of this Case for the reason that it involves an incorrect and erroneous construction and interpretation, by the above mentioned State Courts, of certain recent decisions by this Court and which interpretations by said State Courts destroy and annul the beneficial effects to Petitioners of the recent decisions of this Court.

CHIEF QUESTIONS PRESENTED ARE:

(a) Under the guarantees of the Fourteenth Amendment to the United States Constitution, has a member of a labor union, under the conditions existing in this case, the right to peaceably carry a placard upon a public street in front of the place of business of a person with whom such labor union has a dispute or controversy, which placard has printed thereon a truthful statement of facts with reference to such labor controversy or dispute?

(b) Do the anti-trust statutes of Texas, to-wit: Articles 1632 to 1634, Penal Code of Texas, deny to Petitioners under the facts in this case, their constitutional rights of

free speech and freedom of the press guaranteed by and under the Fourteenth Amendment to the Constitution of the United States?

(c) Can a state by the enactment of a statute, whether it be an anti-trust statute or not, deny to a labor union the right to have one of its members peaceably carry a placard upon a public sidewalk in front of the place of business of a person with whom such labor union has a dispute or controversy, which placard has painted or printed thereon a truthful statement of facts with reference to such labor controversy or dispute?

(d) Can the scope of the Fourteenth Amendment to the United States Constitution be confined by the notion of a state, regarding wise limits of an injunction in an industrial dispute, whether those limits are defined by State Statutes or by judicial organs of such State?

(e) Can these State Courts deny to these workers this right of free communication, even though such workers were not in Ritter's employ?

(f) Can these State Courts deny to these workers the right to communicate the facts of this dispute, deemed by them to be relevant to their interests, because of concern of the economic interests of Ritter against whom such workers were seeking to enlist public opinion?

(g) Is the dissemination of information concerning the facts of a labor dispute regarded as within that area of free discussion that is guaranteed by the United States Constitution?

(h) Is the interpretation by the Court of Civil Appeals at Galveston of this Court's decision in the case of Amer-

ican Federation of Labor et al. v. Swing, a correct interpretation?

This interpretation by that State Court appears in the opinion of that Court overruling the Motion for Rehearing (Or. R. 48) and reads as follows:

> "As we interpret the opinion, the Court held that in the absence of criminal acts or other unlawful conduct under the statutes of a state, a union cannot be enjoined from picketing, etc."

(i) Is the interpretation by the Court of Civil Appeals at Galveston of this Court's decision in the case of Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc., a correct interpretation?

This interpretation by that State Court appears in the opinion of that Court overruling the Motion for Rehearing (Or. R. 50) and reads as follows:

> "In effect, the Court in this case held that, under the constitution, the right of free speech is not unlimited but that, under a proper state of facts, state courts are vested with authority to enjoin picketing by a labor organizatiton, in protecting the rights of its citizens where such picketing is 'enmeshed' with violence or where it involves such conduct as the state is authorized to declare unlawful or the breach of such laws as are necessary for the protection and welfare of its residents."

(j) Is the construction by the Court of Civil Appeals at Galveston of the Fourteenth Amendment to the United States Constitution a correct construction?

This contruction by that State Court appear in the opinion of that Court overruling the Motion for Rehearing (Or. R. 50) and reads as follows:

"It follows, we think, with equal force, that the Fourteenth Amendment of the Federal Constitution does not make unconstitutional the use of an injunction as a means of preventing the violation of the Texas Anti-trust laws, Articles 1632, et seq., the constitutionality of which have been recently sustained by the Supreme Court of the United States in the Case of Tigner v. State of Texas, 310 U. S. 141, in an opinion handed down by Justice Frankfurter on May 6th, 1940."

REASONS WHY THIS WRIT SHOULD BE GRANTED

(a) Each of the questions above presented involve general importance. They present to this Court for the first time the constitutional rights and guarantees of Texas workers under the Fourteenth Amendment to the United States Constitution to peaceably publicize and communicate to the public, in the manner attempted by Petitioners, the true facts of a labor dispute deemed by them to be relevant to their interests.

(b) In view of recent decisions of this Court holding legal, almost identical acts by workers in states other than Texas and holding that the privilege and right of said workers to do such acts are protected and guaranteed by the United States Constitution, similar questions will be constantly arising in Texas.

(c) The decisions of the State Courts of Texas, which are involved in this Case, deny to the workers of Texas rights and privileges which they consider the recent decisions of this Court give to them.

(d) The decision of said Court of Civil Appeals and its decision overruling the Motion for Re-hearing, announce principles of law, which are in open and direct conflict with

certain recent decisions of this Court which decisions by this Court will be referred to in Petitioner's Brief, attached hereto, in support of this petition. The order of the Supreme Court of Texas, refusing the Petition for Writ of Error, approved the two opinions of the Court of Civil Appeals as written and makes the matters therein decided and the statements therein made the rule of State Court decisions in Texas. These decisions affect the rights of several hundred thousand workers in Texas.

The Petitioner, National Surety Corporation of New York, is interested in this case only to the extent of the costs adjudged against it and is joined herein to the extent of its interest.

Petitioners file herewith a certified transcript of the Record as required by Rule 38(1) and attach hereto a brief in support of this Petition.

WHEREFORE, Petitioners jointly and severally pray that this Court in the exercise of its discretion may issue its Writ of Certiorari to review the decision herein of the Court of Civil Appeals for the First Supreme Judicial District of Texas, at Galveston, which Court has the record in this case, and for such other orders as may be appropriate.

Respectfully submitted,

SEWALL MYER,

Attorney for Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. .....

CARPENTERS AND JOINERS UNION OF AMERICA, LOCAL NO. 213, ET AL.,

Petitioners.

vs.

RITTER'S CAFE, ET AL.,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

Statement of the Case

Reference is here made to the statement in the foregoing Petition.

Opinions Below

The opinion of the Court of Civil Appeals, to review which this Petition for Certiorari is sought, is reported in 149 Southwestern Reporter (Second Series) 694.

Jurisdiction of This Court

This Court has jurisdiction of this Case under Section 237 of the Judicial Code as Amended by the Act of February 13th, 1925, (U. S. C. A. Volume 28, Section 344) for the reason that the State Court of Civil Appeals by its judgment has denied to Petitioners rights, privileges and

immunities claimed by them under the Constitution of the United States and especially under the Fourteenth Amendment thereto.

Specification of Errors

1. The State Court erred in its original opinion in this case (Or. R. 40) in holding that the exercise of the right of free speech and of the press, as was done by Petitioners in this case, is not guaranteed and protected to Petitioners by the Constitution of the United States and in holding in this connection that the exercise by Petitioners of such rights and guarantees is limited and prevented by the rights of Respondents Ritter's Cafe and Ritter to acquire and possess property, an instance of which being the right to carry on the Cafe Business in a lawful way without this interference by Petitioners.

2. The State Court erred in its original opinion in this case (Or. R. 39) in holding that under the authority of Article 4642, Section 1 of the Revised Statutes of Texas, 1925, a state court of equity, regardless of the Fourteenth Amendment to the United States Constitution, should grant an injunction against a labor union, enjoining and restraining permanently, peaceable picketing, where such relief is necessary for the preservation of the business of Ritter's Cafe or other property rights.

3. The State Court erred in its original opinion in this case (Or. R. 40) in holding that since there existed no labor dispute between Ritter and his employees engaged in operating Ritter's Cafe, there can be no peaceable picketing of said Cafe by Petitioners.

4. The State Court erred in its original opinion in this case (Or. R. 40) in holding that a member of Petitioners'

unions, under the facts of this case, has no legal right to carry upon a public sidewalk in front of Ritter's Cafe, in a peaceable manner, a placard which has painted or printed thereon a truthful statement of facts with reference to a labor dispute or controversy between Petitioners and Ritter, thereby communicating to the public the facts of such labor dispute deemed by Petitioners to be relevant to their interests.

5. The State Court erred in its written opinion overruling the Motion for Rehearing in this case (Or. R. 48) in holding that the decisions of this Court in the cases of American Federation of Labor v. Swing, 85 L. Ed. 513; Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc., 85 L. Ed. 497; Thornhill v. Alabama, 84 L. Ed. 659; and Senn v. Tile Layers Protective Union, 57 Sup. Ct. Rep. 857, are not applicable to and controlling of this case.

6. The State Court erred in its written opinion overruling the Motion for Rehearing in this case (Or. R. 50) in holding that the anti-trust statutes of Texas, to-wit: Articles 1632, to 1634, Penal Code of Texas, deny to Petitioners, under the facts in this case, their constitutional rights of free speech and freedom of the press guaranteed by and under the Fourteenth Amendment to the United States Constitution.

7. The State Court erred in its written opinion overruling the Motion for Rehearing (Or. R. 48) in its interpretation of this Court's opinion in the American Federation of Labor v. Swing Case, supra, as follows: "That in the absence of criminal acts or other unlawful conduct under the statutes of a state, a union cannot be enjoined from picketing—in the manner there undertaken—the place

of business of an employer with whom it is seeking to contract for its members."

8. The State Court erred in its written opinion (Or. R. 49) overruling the Motion for Rehearing in its interpretation of this Court's opinion in the Milk Wagon Driver's Union v. Meadowmoor Dairies, Inc., as follows: "That under the United States Constitution, the right of free speech is not unlimited but that under a proper state of facts, state courts are vested with authority to enjoin peaceable picketing by a labor organization, in protecting the rights of its citizens where such picketing is enmeshed with violence or where it involves such conduct as the state is authorized to declare unlawful or the breach of such laws as are necessary for the protection and welfare of its residents.

9. The State Court erred in its written opinion (Or. R. 50) overruling the Motion for Rehearing in its construction of the Fourteenth Amendment to the United States Constitution as follows: "That the Fourteenth Amendment of the Federal Constitution does not made unconstitutional the use of an injunction as a means of preventing the violation of the Texas Anti-trust laws, Articles 1632 et seq."

Argument

In support of the foregoing specifications of error we submit a brief argument directed to each of the following points.

1. MAKING THE CONSTITUTIONAL RIGHT OF PETITIONERS TO HAVE ONE OF THEIR MEMBERS PEACEABLY PICKET, TO DEPEND UPON THE EXISTENCE OF A LABOR DISPUTE BETWEEN

RITTER, THE EMPLOYER, AND HIS EMPLOYEES, IS A BAN UPON FREE COMMUNICATION, INCONSISTENT WITH THE GUARANTY OF FREE SPEECH UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

This Court's decision in American Federation of Labor, et al., v. Swing, et al., 85 Law Ed. 513, sustains this proposition.

The State Court, in its original opinion (Or. R. 41) and in its opinion overruling Motion for Rehearing (Or. R. 48) declined to follow this Court's decision and based its decision of this case very largely upon the proposition that a labor dispute between an employer and his employees is an essential requisite to the right of peaceable picketing.

In view of the action of the State Supreme Court in refusing a Petition for Writ of Error, the above erroneous declaration of the law by the Court of Civil Appeals will constitute the rule of decision in Texas unless overruled by this Court in this case.

Both State Courts had the benefit of this Court's opinion in the Swing Case when they made their erroneous decisions.

2. THE CONSTITUTIONAL RIGHT OF PETITIONERS' MEMBERS TO CARRY SUCH PLACARD UPON A PUBLIC SIDEWALK IN FRONT OF RITTER'S CAFE, IN THE MANNER AND UNDER THE CIRCUMSTANCES AS WAS DONE IN THIS CASE, CANNOT BE PREVENTED BY AN INJUNCTION ISSUED BY A STATE COURT UPON THE GROUNDS AND BECAUSE OF THE FACT THAT THE BUSINESS

OF RITTER'S CAFE WOULD BE INJURED THEREBY.

This Court's decision in Thornhill v. State of Alabama, 84 Law.Ed. 659, and in American Federation of Labor v. Swing, sustain this proposition.

Both State Courts, although they each had the benefit of this Court's opinion, in the Thornhill Case, declined to follow this Court's opinion and held exactly contrary to this Court's decision in the Thornhill Case. Unless this Court in this case reverses and overrules these decisions by the State Courts, the law in Texas will be established exactly contrary to this Court's decision in the Thornhill case.

3. THE ANTI-TRUST STATUTES OF TEXAS CANNOT AND DO NOT EXCLUDE WORKINGMEN FROM PEACEFULLY EXERCISING THE CONSTITUTIONAL RIGHT OF FREE COMMUNICATION OF THE FACTS OF A LABOR DISPUTE IN THE MANNER AS WAS BEING DONE IN THIS CASE.

The opinion of this Court in the case of American Federation of Labor, et al., v. Swing, et al., supra, expressly sustains this proposition.

The State Courts in this case have declined to be bound by this Court's opinion deciding this proposition in the Swing case.

4. A STATE COURT CANNOT BY INJUNCTION EXCLUDE WORKINGMEN FROM PEACEFULLY EXERCISING THE CONSTITUTIONAL RIGHT OF FREE COMMUNICATION OF THE FACTS OF A LABOR DISPUTE, IN THE MANNER AS WAS BEING DONE IN THIS CASE.

There is no question of violence or preserving the peace involved in this case. This being true the opinion of this Court in the Swing Case expressly sustains the above proposition.

Regardless of the clear and express language used by this Court in the Swing Case, the State Courts declined to be bound by this Court's opinion deciding this proposition.

5. THE DISSEMINATION OF INFORMATION CONCERNING THE FACTS OF THE LABOR DISPUTE INVOLVED IN THIS CASE, COME WITHIN THE AREA OF FREE DISCUSSION THAT IS GUARANTEED BY THE UNITED STATES CONSTITUTION.

The opinion of this Court in the Thornhill Case, supra, expressly sustains this proposition.

6. THE COURT OF CIVIL APPEALS, IN ITS OPINION OVERRULING THE MOTION FOR REHEARING (Or. R. 48) CLEARLY MISINTERPRETS THIS COURT'S OPINION IN THE SWING CASE AND CLEARLY ADDS THERETO WHEN THAT COURT SAYS THAT "A LABOR UNION CANNOT BE ENJOINED IN THE ABSENCE OF CRIMINAL ACTS OR OTHER UNLAWFUL CONDUCT UNDER THE STATUTES OF A STATE."

The State Court in using the words "or other unlawful conduct under the statutes of a state," clearly adds this language to the opinion in the Swing Case.

If this is the law then a state legislature can, by a state statute, make peaceable picketing under all conditions and circumstances unlawful. Also a state statute could prohibit each and every right and privilege which this Court,

in the decisions above referred to, has said are guaranteed to the citizen under the Fourteenth Amendment to the United States Constitution.

In the Swing Case, under conditions very similar to Petioners' case, this Court used this language:

> "That a state has ample power to regulate the local problems thrown up by modern industry and to preserve the peace is axiomatic. But not even these essential powers are unfettered by the requirements of the Bill of Rights. The scope of the Fourteenth Amendment is not confined by the notion of a particular state regarding the wise limits of an injunction in an industrial dispute, whether those limits be defined by statute or by judicial organ of the state. A state cannot exclude workingmen from peacefully exercising the right of free communication, etc."

This language seems too clear to be misunderstood and yet the Court of Civil Appeals has interpreted it to mean that a state statute, even one similar to the Alabama statute in the Thornhill Case, rises above and can destroy the freedom of speech and of the press guaranteed under the Federal Constitution.

Every expression by this Court in the Swing and other cases referred to is the very antithesis of this State Court's interpretation.

Unless this Court in this case reverses and overrules the decision of the State Court in this Case, all of the benefits and rights of the workingmen in Texas under this Court's decision above referred to, will be denied to them.

Not desiring to prolong this argument longer than absolutely necessary, in conclusion we say, that the decisions of this Court which we have cited above, have positively,

unequivocally, plainly and clearly held that a laborer, who peaceably carries a placard upon a public sidewalk, in front of a place of business, as was done in this case, truthfully stating thereon the facts of a labor dispute, between the laborer's union and the owner of the place of business, is protected by the guarantees of the Fourteenth Amendment to the United States Constitution and that no state, either by statute or judicial organ, can prevent this peaceable communication of these facts and further that no state court can construe a state anti-trust statute as denying to said laborer and his union this right and privilege.

On July 23rd, 1941, the Supreme Court of Texas refused a petition for Writ of Error in the case of Borden Company v. Local Union Teamsters No. 133, thereby in effect affirming the decision in that case of the Court of Civil Appeals at Galveston.

In this Borden Case, which is not yet reported, the Galveston Court has again held that there must exist a bona fide labor dispute between the employer, being peaceably picketed, and his employees, as an essential requisite to the right to peaceably picket.

This latest decision by the Court of Civil Appeals at Galveston and which decision has now received the sanction of the Supreme Court of Texas is clearly at variance with and contrary to this Court's decision in the Swing Case. It also clearly shows a purpose on the part of these Texas Courts to refuse to be bound by the decisions of this Court in the recently decided cases hereinbefore cited.

For the reasons above stated, Petitioners earnestly urge that this Court grant its Writ of Certiorari directed to the Court of Civil Appeals for the First Supreme Judicial Dis-

trict of Texas at Galveston and relieve Petitioners from the unjust burden to which they are subjected by the terms of the judgment entered against them by the State Courts in this case.

Respectfully submitted,

SEWALL MYER,
Attorney for Petitioners.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 527

CARPENTERS AND JOINERS OF AMERICA LOCAL NO. 213, ET AL., *Petitioners,*

v.

RITTER'S CAFE, ET AL., *Respondents*

RESPONDENTS' REPLY BRIEF TO PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 527

CARPENTERS AND JOINERS OF AMERICA LOCAL No. 213, ET AL., *Petitioners*,

v.

RITTER'S CAFE, ET AL., *Respondents*

RESPONDENTS' REPLY BRIEF TO PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

Concise Statement of the Matter

The opinion of the Court below is reported in 149 Southwestern Reporter (Second Series) 694. (Writ of Error refused by the Supreme Court, State of Texas.) The findings of fact and conclusions of law of the Trial Court are embodied in said opinion.

The controversy between the parties centered upon the alleged right of Petitioners to picket Respondents' place of business (a small cafe), for the sole purpose of compelling

Respondent Ritter to break a lawful contract which he had with W. A. Plaster, a disassociated third party, by the terms of which Plaster was to erect a small building on Respondent Ritter's homestead. (cf. Statement of Facts below, page 86.) Respondent Ritter had in his employ members of an affiliate union of the American Federation of Labor, which employees were compelled, by the initiation of such picketing by Carpenters and Painters to relinquish their employment relation with Respondent Ritter, although a complete state of harmony existed between the Restaurant Employees Union (A. F. of L) and Respondent Ritter. The evidence was without dispute, and the findings of fact and conclusions of law unchallenged, and they are correctly and completely set forth in the opinion of the Court below. We refer to that opinion for a statement of the entire case.

Summary of Argument

The Court below applied the general rules and principles governing the activities of a labor organization when they were in violation of Respondents' right to engage in the free pursuit of the lawful business and when such activities were in violation of the Anti-Trust Statutes of the State of Texas.

The opinion of the Court below shows that the controversy existing is one involving the right of a citizen of the State of Texas to conduct a lawful business in a lawful manner, and his right to enter freely into a lawful and subsisting contract with a third person who is wholly disconnected from Petitioners' organizations. It involves the inherent right of the State of Texas to restrict, by reasonable laws and regulations, activity of Petitioners' organizations in their unlawful attempt to restrict the constitutional right of Respondents to enter into a lawful contract with a third party, and to interfere with the free pursuit of Respondents' business. It accordingly follows that the subject matter of the controversy

is really one in which the Petitioners here seek to have another hearing rather than to correct any misapplication of settled rules of law or any conflict of decisions. Briefly stated, the Court below held that the picketing activities of Petitioners' organizations was part of a scheme to compel Respondent by coercion to break a contract which Respondents had previously executed, in the performance of a lawful purpose, with a disassociated third party, and that such conduct constituted a violation of the Anti-Trust Statutes of the State of Texas, and the alleged constitutional right of free speech was being employed to further a boycott. The Court examined the facts as disclosed by the undisputed evidence, the unchallenged findings, and found that the acts on the part of Petitioners constituted an illegal trust and conspiracy in restraint of trade and a secondary boycott; that such conduct was prohibited by the Statutes (Civil and Criminal) of the State of Texas, and were in violation of the Federal and State Constitutions protecting Respondents in the ownership, use and employment of their property and the right to engage in a lawful business in a lawful manner without outside interference, and the right to freely contract with any person, in a lawful undertaking, without illegal restrictions. That the right of free speech to Petitioners was no greater nor entitled to greater protection than the rights of these Respondents to own, use and enjoy their property, and to enter into lawful contracts without outside interference and dictation; that the Courts of the State of Texas were given plenary authority to prohibit such unlawful acts even though they be executed under the guise of the exercise of the right of free speech. The Court below accordingly held that the Petitioners' claims were without foundation in fact and in law.

Obviously, the allegation in the petition for a Writ of Certiorari here that there is a conflict between the decision of

the Court below and that of this Court in the cases of AMERICAN FEDERATION OF LABOR v. SWING, 85 L. Ed. 513; MILK WAGON DRIVERS UNION v. MEADOWMOORE DAIRIES, INC., 85 L. Ed. 497; SENN v. TILE LAYERS PROTECTIVE UNION, 57 Sup. Ct. Rep. 857; and THORNHILL v. ALABAMA, 84 L. Ed. 1093, is without foundation. In the last case cited, this Court held and recognized the State's power to regulate the right to picket and, in no uncertain terms, affirmed the right of a State to enact reasonable laws in the interest of society. This Court stated:

> "It is true that the right of employers and employees to conduct their economic affairs and to compete with others for a share in the products of industry are subject to modification or qualification in the interest of society in which they exist."

The SENN case decided merely that an organization might make known the facts of a labor dispute (which are absent in the case before this Court), and that the Wisconsin Labor Code violated no constitutional right, and said decision does not identify picketing with the right of free speech. It likewise repudiated picketing for an unlawful purpose by stating:

> "peaceful picketing" "implies not only absence of violence, but absence of any unlawful act."

In the MEADOWMOORE DAIRIES case, this Court held that the right of free speech is not unlimited but that, under certain circumstances and facts, State Courts have the authority to enjoin picketing by a labor organization in order to protect the right of its people where the picketing is "enmeshed" with such conduct as the State Statute declares unlawful or where it breaches such laws as are considered necessary for the protection of its citizens. In the SWING case, this Court decided merely that a labor organization could not be enjoined

from picketing an employe 's place of business, with whom the union sought to contract for its members. Here the Court below makes no pretentions even to intimate that picketing where lawful, is not now generally conceded. It simply holds under well recognized rules of law, that the State has the power to regulate the means of exerting economic pressure and the State's right to curb unlawful conduct in the interest of society, and the welfare of its people. No attempt is made to restrict lawful picketing, where such activity is conducted for a lawful purpose.

The decision of the Court below was clearly correct and should not be disturbed. It is of course a general rule of law that a State possesses the inherent power to regulate picketing activities in the interest of its people, and for their protection. While this rule has been stated in different ways, the rule itself is clearly settled law with respect to the power of the State to enact reasonable legislation affecting labor organizations. As it is put in the case of CARLSON V. STATE OF CALIFORNIA, 310 U.S. 106, 60 S. Ct. 746, 749, 84 L. Ed. 1104 (opinion by MR. JUSTICE FRANKFURTER):

> "The power and duty of the State to take adequate steps to preserve the peace and protect the privacy, the lives, and the property of its residents cannot be doubted."

See also THORNHILL V. ALABAMA, 310 U.S. 88, 60 S. Ct. 736, 84 L. Ed. 1093. It is likewise well settled, that picketing may not be condemned, under a state of fact, where a dispute exists with an employer, notwithstanding the absence of employer-employee relationship, provided there is absence of criminal or unlawful acts condemned by the Statutes of a given State. This Court, speaking, through MR. JUSTICE FRANKFURTER, in AMERICAN FEDERATION OF LABOR V. SWING, 312 U.S. 321, 61 S. Ct. 568, 85 L. Ed. 513, stated:

"* * * * We merely hold that in the circumstances of the record before us the injunction authorized by the Supreme Court of Illinois, does not transgress its constitutional power. But just as a state through its legislature may deal with specific circumstances menacing the peace by an appropriately drawn act, Thornhill v. Alabama, supra, so the law of a state may be fitted to a concrete situation through the authority given by the state to its Courts. This is precisely the kind of a situation which the Thornhill opinion excluded from its scope * * * *"

Thus, the cases of THORNHILL V. ALABAMA and CARLSON V. CALIFORNIA merely decide that the Statute and ordinance were imperfectly drawn and constituted a menace to free speech.

An examination of the opinion of the Court below indicates that it was merely complying with the Civil and Criminal Statutes of Texas (R.S., Articles 5152, 5153 and 5154, and Article 1643 of the PENAL CODE, R. S., Articles 7426 and 7428, and Articles 1632, 1634 and 1635 of the PENAL CODE), which prohibit an attempt to restrict a citizen in the free pursuit of his lawful business, or threats to boycott such a person. This Court, in the case of TIGNER V. STATE OF TEXAS, 310 U.S. 1431, 60 S. Ct. 879, 84 L. Ed. 1124, 130 A.L.R., 1321, opinion by MR. JUSTICE FRANKFURTER, held that the Texas Anti-Trust Statute, Article 1632, etc., was constitutional.

Here Petitioners sought to compel Respondents, with whom no quarrel existed, to break a lawful contract previously entered into with a third party, by threats and positive injuries to Respondents; the Court below holding that such conduct was oppressive, involved duress and constituted a combination and secondary boycott, in violation of the Texas Anti-Trust Statute, as well as the established decisions of this Court and of the State of Texas. ALLGEYER V. LOUISIANA, 165 U.S. 578, 17 S. Ct. 427, 41 L. Ed. 835; DUPLEX PRINTING PRESS

COMPANY v. DEERING, 254 U.S. 443, 41 S. Ct. 172, 65 L. Ed. 349, 16 A.L.R. 196; HOPKINS v. OXLEY STAVE CO., 28 C.C. A. 99, 49 U.S. App. 709, 83 Fed. 912; LOEWE v. LAWLOR, 208 U.S. 274; DORCHY v. KANSAS, 272 U.S. 306, 47 S. Ct. 86, 71 L. Ed. 248; PARKER PAINT AND WALL PAPER CO. v. LOCAL NO. 813, 105 S.E. 911 (W. Va.); the FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION; Section 19, Article I, CONSTITUTION OF THE STATE OF TEXAS; EX PARTE GEORGE TUCKER, 110 Texas 335, 220 S.W. 75; FEHR BAKING CO. v. BAKERS UNION, 20 Fed. Supp. 691.

There is no evidence to support any of the criticisms of the Court below made on pp. 14-17 of the Petitioners' brief.

Since the Court below has correctly summarized the undisputed evidence and unchallenged findings and has correctly applied the general principles of law governing the activities of labor organizations, in such cases, it is submitted Respondents will not burden this Court with further argument on this point.

Finally, the Court below makes no attempt to curb picketing where it is done in the pursuit of a lawful purpose, and in a lawful manner.

Of course, this question is entirely different from that raised in the cases cited in Petitioners' brief. The gulf between the facts in this case and that of the cases cited by Petitioners is too wide, and all too plain for argument.

WHEREFORE, Respondents respectfully submit that the decision of the Court below was correct and should be affirmed.

Respectfully submitted,

WILLIAM A. VINSON,

BERNARD A. GOLDING,

BERNARD A. GOLDING,
Attorneys for Respondents

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 527

CARPENTERS AND JOINERS UNION OF AMERICA, LOCAL No. 213, ET AL.,

Petitioners,

vs.

RITTER'S CAFE, ET AL.

PETITION FOR REHEARING AND BRIEF IN SUPPORT THEREOF.

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SEWALL MYER,
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Counsel for Petitioners.

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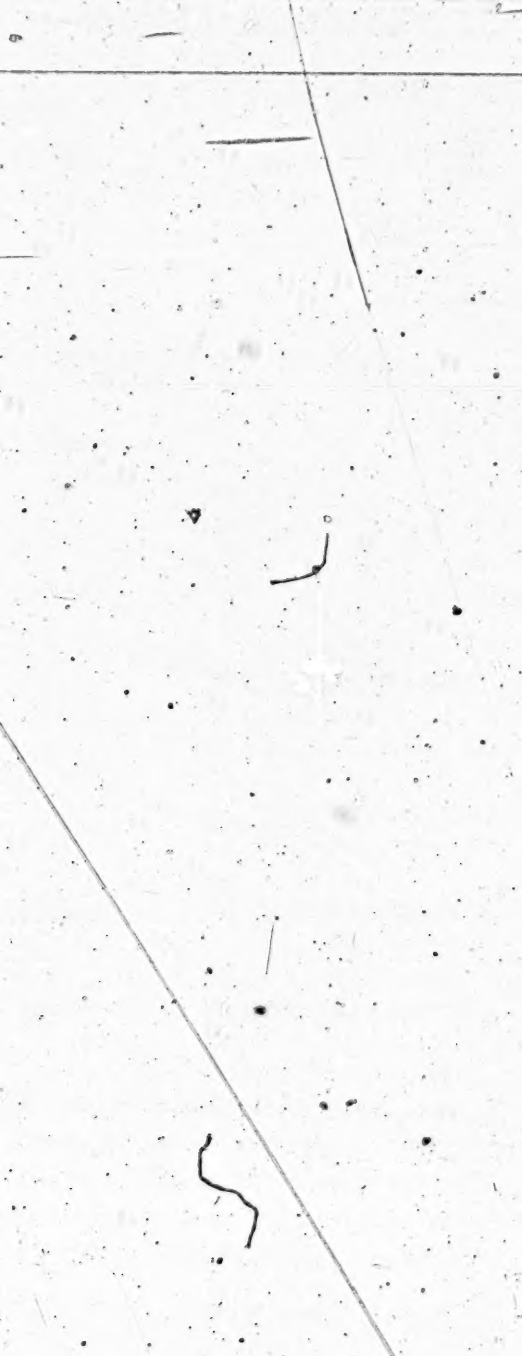

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 527

CARPENTERS AND JOINERS UNION OF AMERICA, LOCAL No. 213, ET AL.,

Petitioners,

vs.

RITTER'S CAFE, ET AL.

PETITION FOR REHEARING.

To the Honorable the Justices of the Supreme Court of the United States:

Petitioners respectfully represent to this Honorable Court as follows:

1. Petitioners are the petitioners-appellants in the above entitled matter.

2. On March 30, 1942, this Honorable Court issued a decision herein, sustaining an injunction which enjoined petitioners from peacefully picketing the respondent at his cafe and enjoined them from carrying banners in front of the cafe, which banners contained inscriptions truthfully

informing the public that "The Owner of This Cafe Has Awarded A Contract to Erect A Building to W. H. Plaster Who is Unfair to The Carpenters Union 213 and Painters Union 130, Affiliated With The American Federation of Labor".

3. In reaching its conclusion, this Honorable Court reasoned from a mistaken statement of petitioners' claims. In addition, crucial reliance was placed upon decisions of State courts, most of which were subsequently overruled. This Honorable Court ruled that the decree of the Court of Civil Appeals of Texas did not infringe the freedom of speech guaranteed by the Fourteenth Amendment to the Constitution of the United States.

4. The decision constitutes an extreme departure from principles heretofore announced by this Honorable Court, and has thereby precipitated great confusion among organized working people as to the nature and extent of the constitutional protection of their means of communicating their grievances to the public.

5. This Honorable Court premised its decision on considerations and principles that were neither explicit nor implicit in the decision of the court below. Accordingly, petitioners did not, either in their brief or oral argument, discuss the considerations or principles relied upon by this Honorable Court. Therefore, petitioners earnestly request an opportunity to present full argument on these matters.

6. The granting of such an opportunity is especially appropriate in view of the inestimable importance of the said decision to organized labor, and in view of the close division among the Honorable Justices of the Supreme Court, and in view of the absence of Mr. Justice Roberts during the course of oral argument.

Wherefore, petitioners pray this Honorable Court that it grant the rehearing requested herein.

Respectfully submitted,

JOSEPH A. PADWAY,
SEWALL MYER,
HENRY KAISER,
Counsel for Petitioners.

I hereby certify that this petition is being presented in good faith and not for purposes of delay.

_____,

JOSEPH A. PADWAY.

BRIEF IN SUPPORT OF PETITION.

Introduction.

We appreciate that, customarily, a brief in support of a petition for rehearing is and should be short and concise. However, for reasons which we shall soon assert, we respectfully ask the Court's indulgence for filing a rather full brief in support of the instant petition.

The decision of this Honorable Court raises constitutional questions and evolves principles of transcendent importance. These were not, and we respectfully suggest could not reasonably be, anticipated from the record before this Honorable Court.

The attorney for petitioners, out of respect for the valuable time of this Honorable Court, relied upon a very short brief submitted in support of the application for a writ. He did so because of his studied conviction that the decision of the lower court was completely at variance with the doctrines pronounced by this Honorable Court. We realize that mistaken judgment of this kind is neither ground for a rehearing, nor does it justify a relaxation of the rules regulating briefs in support of petitions for rehearing. But we earnestly urge that this was not an instance of mistaken judgment. Indeed, our entire petition is based on the claim that this Honorable Court has in effect reversed its own controlling decisions.

We believe that the effect of the instant decision will be drastically to curtail basic civil liberties for organized labor and others, all in derogation of the Constitution of the United States and of the decisions of this Honorable Court.

Obviously, under these circumstances, more extensive argument than is usual in briefs of this kind is appropriate.

The Court Misconceived Petitioners' Contentions.

The Court's statement of petitioners' claim reflects the essential error of its approach. We are told that

> "the petitioners now claim that there is to be found in the Due Process Clause of the Fourteenth Amendment a constitutional command that peaceful picketing must be *wholly immune from regulation* by the community in order to protect the general interest, that the states *must be powerless to confine* the use of this industrial weapon *within reasonable bounds:*" (Emphasis supplied.)

Such a claim would obviously be wholly without merit. It could not possibly be sustained unless the Due Process Clause were to be entirely ignored and unless every decision thereon were to be repudiated and overruled.

But, it is respectfully submitted, petitioners did not and do not make that claim or any other claim remotely resembling it. What petitioners did claim is that the *particular regulation in this case* by the Court of Civil Appeals of Texas was repugnant to the Fourteenth Amendment.

Petitioners' actual claims are set forth in the brief submitted in support of the petition for writ of certiorari. We quote the claims therein made, because they show quite clearly the sharp difference between the claims actually made and those mistakenly assigned to petitioners:

> "1. Making the constitutional right of petitioners to have one of their members peaceably picket, *to depend upon the existence of a labor dispute between Ritter, the employer, and his employees,* is a ban upon free communication, inconsistent with the guaranty of free speech under the Fourteenth Amendment of the United States Constitution" (Brief, pp. 14-15).
>
> "2. The constitutional right of petitioners' members to carry such placard upon a public sidewalk in front

of Ritter's Cafe, *in the manner and under the circumstances as was done in this case*, cannot be prevented by an injunction issued by a state court *upon the grounds and because of the fact that the business of Ritter's Cafe would be injured thereby*" (Brief, pp. 15-16).

"3. The Anti-Trust Statutes of Texas cannot and do not exclude workingmen from peacefully exercising the constitutional right of free communication of the facts of a labor dispute *in the manner as was being done in this case*" (Brief, p. 16).

"4. A state court cannot by injunction exclude workingmen from peacefully exercising the constitutional right of free communication of the facts of a labor dispute, *in the manner as was being done in this case*" (Brief, p. 16).

"5. The dissemination of information concerning the facts of the labor dispute *involved in this case*, come within the area of free discussion that is guaranteed by the United States Constitution." (Brief, p. 17.) (Emphasis supplied.)

We repeat, then, petitioners by no means asserted that picketing—or any other phase of free speech—is an absolute right beyond the regulatory powers of the state.

The Unusual and Erroneous Approach of the Court.

Having thus erroneously posed petitioners' claim, the court had little difficulty in repudiating it. In so doing, however, the court forsook its usual approach to cases involving civil liberties. It unduly emphasized the sovereign powers of the State of Texas and, at the same time, unduly deemphasized the Bill of Rights.

In the instant case the court neither expressly "adverted to the generous scope that must be given to the guarantee of free speech"—Mr. Justice Frankfurter in *Milk Wagon Drivers Union* v. *Meadowmoor*, 312 U. S. 287,—nor did it give it such scope. Heretofore, this Honorable Court, as it

has "frequently indicated," "guarded" the right of free speech—even when it was exercised in the form of a peaceful picket—"with a jealous eye." Mr. Justice Frankfurter in *American Federation of Labor* v. *Swing*, 312 U. S. 321, 325.

It has become axiomatic that, whatever the extent of the restraints imposed upon state action by the Due Process Clause, those restraints are greater where civil liberties are involved. *Schneider* v. *State*, 308 U. S. 147, 161; *Herndon* v. *Lowry*, 301 U. S. 242, 258; *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152 n. Therein lies the explanation for the "seeming inconsistency"[1] on the part of those great judicial champions of civil liberties, Mr. Justice Holmes, Mr. Justice Brandeis and Mr. Justice Cardozo. These great justices, particularly Mr. Justice Holmes and Mr. Justice Brandeis, insisted upon the right of states to exercise their sovereign powers and formulate their own social and economic policies free from restriction by the Fourteenth Amendment. *Lochner* v *New York*, 198 U. S. 45; *Truax* v. *Corrigan*, 257 U. S. 312; *Adams* v. *Tanner*, 244 U. S. 590; *Coppage* v. *Kansas*, 236 U. S. 1.

In cases involving a state restriction of civil liberties, however, they were among the most prominent of those who asserted the Due Process Clause as a bar to such state action. See *Gitlow* v. *New York*, 268 U. S. 652; *Gilbert* v. *Minnesota*, 254 U. S. 325. See also *Abrams* v. *United States*, 250 U. S. 616.

As has been cogently stated, any inconsistency attributable to these Justices was but a "seeming" or surface inconsistency.

> "Friendly critics have suggested that Cardozo viewed encroachments upon civil liberties with less

[1] Frankfurter, Cardozo and Public Law, 52 Harvard Law Review 440, 461 n.

deference to the legislative judgment than that which he accorded to economic measures. The same seeming inconsistency has been suggested against Holmes, and the answer made in Holmes' case applies to Cardozo as well:

"'The Justice deferred so abundantly to legislative judgment on economic policy because he was profoundly aware of the extent to which social arrangements are conditioned by time and circumstances, and of how fragile, in scientific proof, is the ultimate validity of a particular economic adjustment. He knew that there was no authoritative fund of social wisdom to be drawn upon for answers to the perplexities which vast new material resources had brought. And so he was hesitant to oppose his own opinion to the economic views of the legislature. But history had also taught him that, since social development is a process of trial and error, the fullest possible opportunity for the free play of the human mind was an indispensable prerequisite. Since the history of civilization is in considerable measure the displacement of error which once held sway as official truth by beliefs which in turn have yielded to other truths, the liberty of man to search for truth was of a different order than some economic dogma defined as a sacred right because the temporal nature of its origin had been forgotten. And without freedom of expression, liberty of thought is a mockery. Nor can truth be pursued in an atmosphere hostile to the endeavor or under dangers which only heroes hazard.

"'Naturally, therefore, Mr. Justice Holmes attributed very different legal significance to those liberties of the individual which history has attested as the indispensable conditions of a free society from that which he attached to liberties which derived merely from shifting economic arrangements. . . . Because these civil liberties were explicitly safeguarded in the Constitution or conceived to be basic to any notion of the liberty guaranteed by the Fourteenth Amendment, Mr. Justice Holmes was far more ready

to find legislative invasion in this field than in the area of debatable economic reform.' Frankfurter, Mr. Justice Holmes and the Supreme Court (1938) 50-51."[2]

As already observed, the approach of these Justices in cases involving civil liberties, which has been fully adopted by this Honorable Court in labor and other free speech cases,[3] has, for reasons that do not seem justified, been abandoned in the instant case. Instead, the Court, probably as a result of the mistaken statement of petitioners' claim, asserts and emphasizes as its major premise the right of Texas to promote "the health, safety, morals and general welfare of its people."[4]

The majority opinion leaves the impression that the State of Texas, after careful investigation, had concluded that peaceful picketing beyond a very precise point was highly detrimental to the general welfare of the state and must, therefore, be prohibited.

That, of course, is not so. The state decision brought before this Honorable Court did not come "encased in the armor wrought by prior legislative deliberation." Mr. Justice Black in *Bridges* v. *California*, 314 U. S. — . And even if it had, there could be no basis for a legislative find-

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[2] Frankfurter, Cardozo and Public Law, 52 Harvard Law Review 440, 461 n.

[3] *Thornhill* v. *Alabama*, 310 U. S. 88; *Carlson* v. *California*, 310 U. S. 106; *American Federation of Labor* v. *Swing*, *supra*; *Milk Wagon Drivers Union* v. *Meadowmoor*, *supra*; *Bridges* v. *California*, 314 U. S. —; *Cantwell* v. *Connecticut*, 310 U. S. 296; *Schneider* v. *State*, *supra*; *C. I. O.* v. *Hague*, 307 U. S. 196.

[4] Mr. Chief Justice Hughes in *Near* v. *Minnesota*, 283 U. S. 697, 707. It must not, of course, be forgotten that the *Near* case is one of the great milestone decisions safeguarding and preserving civil liberties against state infringement. There, the Court voided a legislative attempt by the State of Minnesota to suppress a newspaper by injunction. This, in spite of the fact that the newspaper had been publishing scandalous and libelous matters.

ing that picketing in the circumstances of the instant case was a greater evil or greater threat to the general welfare of Texas than picketing in the circumstances of the *Thornhill* case (*Thornhill* v. *Alabama*, 310 U. S. 88) was to the State of Alabama, or picketing in the circumstances of the *Carlson* case (*Carlson* v. *California*, 310 U. S. 106) was to the State of California, or picketing in the circumstances of the *Journeymen Tailors'* case (*Journeymen Tailors Union, Local No. 195, et al.*, v. *Miller's, Inc.*, 61 S. Ct. 732) was to the State of New Jersey, or picketing in the circumstances of the *Wohl* case (*Bakery & Pastry Drivers & Helpers Local 802* v. *Wohl*, decided March 30, 1942) was to the State of New York, or picketing in the circumstances of the *Swing* (*supra*) and *Meadowmoor* (*supra*) cases was to the State of Illinois.

Continuing the assumption that the Legislature of Texas had fixed the limits of free speech by workingmen, it would still be necessary, in order to justify such a drastic restriction, to support the "legislative judgment in the light of the facts made known or generally assumed"; to predicate that judgment "upon some rational basis." Mr. Justice Stone in *United States* v. *Carolene Products Co.*, *supra*, 152.

For otherwise—and history has proved this to be especially true of labor legislation—constitutional cases of the highest importance would be decided "on abstract issues, on tenuous theories of economic and political philosophy"[5] rather than on supportable facts.

Thus, Mr. Justice Roberts, speaking for the Court in *Schneider* v. *State*, *supra*, 161, stated:

> "This court has characterized the freedom of speech and that of the press as fundamental personal rights and liberties. The phrase is not an empty one and

[5] Frankfurter, "Hours of Labor and Realism in Constitutional Law," 29 Harvard Law Review 353, 365.

was not lightly used. It reflects the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free government by free men. It stresses, as do many opinions of this court, the importance of preventing the restriction of enjoyment of these liberties.

"In every case, therefore, where legislative abridgment of the rights is asserted, the courts should be astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions. And so, as cases arise, the delicate and difficult task falls upon the courts *to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights.*" (Emphasis supplied.)

Again, speaking for the Court in *Herndon* v. *Lowry*, *supra*, 258, Mr. Justice Roberts said:

"The power of a state to abridge freedom of speech and of assembly is the exception rather than the rule and the penalizing even of utterances of a defined character must find its justification in a reasonable apprehension of danger to organized government. The judgment of the legislature is not unfettered. The limitation upon individual liberty must have appropriate relation to the safety of the state. Legislation which goes beyond this need violates the principle of the Constitution."

Plainly, there are no facts whatever in the instant record that do or could justify a conclusion either by our assumed Legislature or by the few judges who constitute the Court of Civil Appeals that picketing under the circumstances of this case constituted so great an evil as to require, for the general welfare of the State of Texas, the abridgment of

"fundamental personal rights and liberties." No such facts were or are available to Texas Tribunals, even if they had deemed them necessary to a determination of the constitutional question presented, which they manifestly and erroneously did not. The judgment of the court below certainly "does not evidence any * * * care in balancing * * *" the interest of the community and that of the individual in freedom of discussion. *Thornhill* v. *Alabama, supra,* 105.

The fact is that the Texas Court premised its decision on the common law precedents of that state that antedated —and have been set aside by—the *Thornhill* case. Common law precedents, it may be added, which were the product of the "environment, the social and economic ideas of judges, which * * * became translated into law." Mr. Justice Brandeis, in *Duplex Printing Press Co.* v. *Deering,* 254 U. S. 443, 485.

It would be sufficient to rely upon the written opinions of the Texas Court in order to demonstrate the truth of the foregoing. However, any doubt that might arise from merely reading those decisions is completely dissipated by a decision rendered by the same court a few weeks after that rendered in the instant case. *Borden* v. *Local,* 152 S.W. 822. That case shows conclusively that the decision in the instant case can hardly be said, as stated by Mr. Justice Frankfurter, to have been the result of a declaration by

> "Texas * * * that its general welfare would not be served if, in a controversy between a contractor and building workers' unions, the unions were permitted to bring to bear the full weight of familiar weapons of industrial combat against a restaurant business, which, as a business, has no nexus with the building dispute. * * *";

nor does it represent an undertaking by

> "Texas * * * to localize industrial conflict by prohibiting the exertion of concerted pressure directed at the business, wholly outside the economic context of the real dispute * * *."

In the *Borden* case the facts are identical with those involved in the *Wohl* case, *supra,* and in the *Meadowmoor* case, *supra,* differing from the latter in that the picketing was entirely peaceful. The Teamsters' Union picketed the retailers who were customers of a dairy company with whom the union was engaged in a labor dispute. The case came before the same court and the opinion was written by the same judge, Chief Justice Monteith. The court discussed the same precedents and the same statutes that it did in the *Ritter* case, in almost the identical language. Then, premising its decision in the *Borden* case squarely on the rule it announced in the *Ritter* case, it held that the picketing was enjoinable.

This, we submit, establishes beyond refute that the State of Texas did not, through its Court of Civil Appeals in the *Ritter* case, draw any careful lines or seek reasonably to regulate the public communication of true facts by organized working people. To put it bluntly, that court was simply determined to perpetuate the prejudices of its judges in complete and total "disregard of the plain meaning"[6] of the decisions of this Honorable Court.

This brings us to what we conceive to be one of the basic errors in the decision of this Honorable Court. As shown, there is no factual foundation upon which to conclude that the State of Texas in the instant case did "impose reasonable regulation." This Honorable Court apparently assumed that the regulation was reasonable because "in forbidding such conscription of neutrals in the circumstances

[6] 90 University of Pennsylvania Law Review, 201, 206.

The Court Applied a Novel and Erroneous Test in the Instant Case.

Having concluded in the *Thornhill* case that picketing was within the constitutional protection of free speech, this Honorable Court logically and consistently applied the same test that it had in other free speech cases,[10] the "clear and present danger" test to permissive state regulation (310 U. S. 88, 105).

All the subsequent free speech labor cases reaffirmed the clear and present danger test.[11]

In the instant case, however, the Court abandoned that test. We are not told why, nor can we conceive of any valid reasons for differentiating between picketing by working people, and the use of this or other forms of utterance by other persons.

In the *Thornhill* case this Honorable Court, for the first time, recognized that picketing was an aspect of free speech and, therefore, entitled to the same protection as any other form of utterance.

In the *Carlson* case this Honorable Court stated:

> "The carrying of signs and banners, no less than the raising of a flag, is a natural and appropriate means of conveying information on matters of public concern. * * * publicizing the facts of a labor dispute in a peaceful way through appropriate means, whether by pamphlet, by word of mouth, or by banner, must now be regarded as within that liberty of communication which is secured to every person by the Fourteenth Amendment against abridgment by a state." 310 U. S. 106, 112.

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[10] *Schenck* v. *United States*, 249 U. S. 47, 39 S. Ct. 247; *Abrams* v. *United States*, *supra*; *Whitney* v. *California*, 274 U. S. 357, 47 S. Ct. 641 (concurring opinion of Brandeis); *Herndon* v. *Lowry*, *supra*; *Cantwell* v. *Connecticut*, 310 U. S. 296; *Bridges* v. *State of California*, *supra*.

[11] *Carlson* v. *California*, *supra*; *Milk Wagon Drivers' Union, et al.*, v. *Meadowmoor Dairies, Inc.*, *supra*; *American Federation of Labor* v. *Swing*, *supra*.

In the *Meadowmoor* case this Honorable Court held that:

> "Peaceful picketing is the workingman's means of communication." 312 U. S. 287, 293.

In the *Swing* case this Honorable Court held that the right to picket is "the right of free discussion." 312 U. S. 321, 325.

Finally, in the instant case it is recognized that peaceful picketing is "an exercise of free speech."

Thus, it has in recent years been abundantly established that there is no constitutional difference between picketing and other means of communication, such as, for example, the radio, the pamphlet, the newspaper, the formal address, and others.

It is true, of course, that historically this particular means of communication has, in the main, been used exclusively by working people. But surely, this incident does not, and cannot, mean that there is any constitutional difference between picketing and the modes of communication usually employed by other groups in society.

It is not required of persons speaking on a political subject to express themselves only in connection with a political controversy. It is not required of persons speaking on religious matters to discuss only facts arising out of a religious controversy. And even assuming these to be prerequisites to protection by the federal Constitution, it is certainly not required that those persons be parties to such controversy. Even more certainly, it is not necessary that they address themselves only to persons who are parties to the controversy. Finally, and perhaps most pertinently, nowhere in these other instances of free speech, with exceptions not here relevant, can a state dictate the nature or personnel of the audience or the precise place where expression may be exercised or the means of expression that must be used.

Why, then, do we find such a host of limitations imposed upon the workingman's means of communication,—limitations that are so flagrantly alien to our concepts of free speech? There is, we think, but one explanation, an explanation that is grounded in history but has no proper bearing on the constitutional issue involved in the instant case.

Prior to the *Thornhill* case, and for many years, because of the prevailing prejudices on the part of many judges, picketing was conceived of as being inherently wicked and hateful. Thus, less than forty years ago, a federal judge held:

> "There is and can be no such thing as peaceful picketing, any more than there can be chaste vulgarity or peaceful mobbing or lawful lynching." *Atchison, etc., Co.* v. *Gee*, 139 Fed. 582.

This conception was by no means unique. Indeed, it probably represented the prevailing view.[12]

Only some twenty years ago, Chief Justice Taft, writing for a majority of this Honorable Court, said that the word "picket" indicated "a militant purpose, inconsistent with peaceable persuasion," that the word "picketing" was a "sinister name," that "peaceful picketing was a contradiction in terms." *American Foundries* v. *Tri-City Council*, 257 U. S. 184, 205, 207; *Truax* v. *Corrigan, supra*, 340.

Small wonder, therefore, that in a judicial atmosphere of that kind neither labor spokemen nor their legal repre-

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[12] *Pierce* v. *Stablemen's Union*, 156 Ca. 70, 103 Pac. 324; *Franklin Union* v. *People*, 220 Ill. 355, 77 N. E. 176; *Vegelahn* v. *Guntner*, 167 Mass. 92, 44 N. E. 1077; *In re Langell*, 178 Mich. 305, 144 N. W. 841; *Glass Co.* v. *Glass Blowers*, 77 N. J. Eq. 219, 79 Atl. 262; *O'Neil* v. *Behanna*, 182 Pa. 236, 37 Atl. 843; *St. Germain* v. *Bakery Workers*, 97 Wash. 282, 166 Pac. 665; *Otis Steel Co.* v. *Molders*, 110 Fed. 698; *Kolley* v. *Robinson*, 187 Fed. 415; *Vonnegut Machinery Co.* v. *Toledo Machine and Tool Co.*, 263 Fed. 192.

sentatives thought of establishing the right to picket on a constitutional basis. Their more immediate objective was to liberalize state and federal statutes and judicial precedents so as to enlarge their elementary rights. It took years to penetrate through the accumulated mass of prejudice before picketing was recognized for what it quite simply and obviously is—a means of stating facts. This recognition was facilitated by the enactment of federal legislation such as the Clayton Act of 1914, the Norris-LaGuardia Act of 1932, the National Labor Relations Act of 1935, and state legislation patterned upon them.

It was in the decision by this Honorable Court, in a case dealing with the constitutionality of the Wisconsin Anti-Injunction Act, a prototype of the federal Norris-LaGuardia Act, that appeared for the first time a statement that adumbrated the *Thornhill* decision:

> "Members of a union might, without special statutory authorization by a State, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution." *Senn* v. *Tile Layers' Protective Union*, 301 U. S. 468, 478.

On the strength of that statement, the precise constitutional issue before the Court in the instant case was, for the first time, presented to this Honorable Court in the *Thornhill* case. Thus, it is clear that in discussing or deciding any case, wherein the claim is made that picketing is protected by the Fourteenth Amendment, "The starting point is Thornhill's Case." Mr. Justice Frankfurter, *Meadowmoor, supra* 293.

In the instant case, however, Mr. Justice Frankfurter saw fit to refer to and to rely upon judicial pronouncements in cases that antedated the *Thornhill* case, cases wherein the constitutional question had never been thought of or raised. It is the erroneous reliance upon these irrelevant cases, we

of the case before us, Texas represents the prevailing, and probably the unanimous, policy of the states."

Later in this brief we shall elaborate on the precise meaning of the phrase "the conscription of neutrals," and its irrelevancy to the instant case. For the nonce, we dwell upon the fact that, even assuming the propriety of relying upon state cases that antedated the *Thornhill* decision and did not involve constitutional issues—and we shall show the impropriety of so doing—nevertheless, the statement made by Mr. Justice Frankfurter is without foundation. The decision by the Texas Court of Appeals in the *Ritter* case does not represent the prevailing—and certainly not the unanimous—policy of the states.

In support of the aforequoted statement, the Court cited Teller, Labor Disputes and Collective Bargaining, (1940), Section 123. Mr. Teller cites decisions from nine states, California, Colorado, Illinois, Indiana, New Jersey, Ohio, Pennsylvania, Washington and West Virginia. A careful check of the decisions cited—some of them being the decisions of lower courts in those states—shows that many of the actual cases cited have been reversed by the state courts on appeal or rehearing, and that of the nine states only two might possibly rule the same way today.

The California cases cited are all decisions of lower courts. As Mr. Teller points out in Volume I of his 1941 Supplement, p. 40, all these cases were overruled by the Supreme Court of California in *Fortenbury* v. *Superior Court*, (decided Oct. 14, 1940), 106 P. (2) 411.

The Colorado decision cited by Mr. Teller, *Perry Truck Lines* v. *Teamsters*, was also a decision of a lower court and was subsequently reversed by the Supreme Court of the state (decided March 18, 1940) 101 P. (2) 436.

For Illinois, Mr. Teller cited the *Meadowmoor* case, which was subsequently reviewed by this Honorable Court and which was, in so far as it was not premised on violence, overruled. Also cited is the case of *Ellingsen* v. *Milk Wagon Drivers' Union*, which the Supreme Court of Illinois, upon consideration of the decisions of this Honorable Court in the *Meadowmoor* and *Swing* cases, reversed (June 13, 1941) 4 C. C. H. Labor Cases, 60,544. The final case cited by Mr. Teller, *Maywood Farms Co.* v. *Milk Wagon Drivers' Union*, has also been recently reversed. 313 Ill. App. 24 (Jan. 19, 1942).

The Indiana case of *Munsey Building Co.* v. *Umbarger*, 17 N. E. (2d) 828, decided in 1938, cited by Mr. Teller, is unquestionably overruled by the recent decision of the Supreme Court of that state in *Harley Davis* v. *Scott Yates*, 4 C. C. H. Labor Cases, 60,367.

The several New Jersey cases cited by Mr. Teller have been overruled by the following recent decisions of the Court of Appeals and Errors, the highest court of the State of New Jersey. *Heine's, Inc.* v. *Truck Drivers*, 129 N. J. Eq. 308, 19 A. (2d) 204 (April, 1941); *Laura Lee Dress Co., Inc.* v. *International Ladies' Garment Workers' Union*, 127 N. J. Eq. 564, 19 A. (2d) 659; *Feller* v. *Local 44*, 129 N. J. Eq. 421, 19 A. (2d) 784 (May 1, 1941); *Newark Milk & Cream Co.* v. *Milk Drivers & Dairy Employees' Local*, 19 A. (2d) 232, (March 27, 1941).

The case of *Alliance Auto Service* v. *Cohen*, cited by Mr. Teller, was decided by a lower court in Pennsylvania and has been reversed by the Supreme Court of that state. 19 A. (2d) 152 (Penn. 1941).

The case cited for the State of Washington has doubtlessly been overruled by the implications of the recent decision of the Supreme Court of that state in *O'Neill* v. *Building Service Employees' International Union*, 115 P. (2d) 662 (July 24, 1941).

As for Ohio, the Supreme Court of that state is apparently reluctant to yield to the decisions of this Honorable Court. This Honorable Court has refused to grant certiorari in a case coming from that state on the ground that the federal question had not been properly presented. *Springfield, Ohio, Local No. 352 of the International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada, et al.*, v. *William Settos*, certiorari denied October 20, 1941, 86 L. Ed. 89, 62 S. Ct. 123. It is clear, though, that the decision of the Ohio court is expressly premised on the doctrine of the Illinois Court in the *Swing* case, a doctrine which has since been repudiated both by this Honorable Court and the Supreme Court of Illinois.

The West Virginia case cited by Mr. Teller, *Parker Paint Co.* v. *Local Union*, 87 W. Va. 631, was decided over twenty years ago. We are unaware of any recent decision on this point by the Supreme Court of West Virginia, but here again, there is no question but that, should it follow the decisions of this Honorable Court in the *Swing, Meadowmoor, Journeymen Tailors* and *Wohl* cases, it will overrule that old decision.

Moreover, Mr. Justice Frankfurter's adoption of the "prevailing" state law is even more amazing in view of the fact that, under the Norris-LaGuardia Act, picketing of the type involved in the present case would not be enjoinable. *New Negro Alliance* v. *Sanitary Grocery Co.*, 303 U. S. 552. Congress, in passing the Norris-LaGuardia Act, has declared it to be the policy of the United States to permit peaceful picketing in situations similar to that involved in Ritter's restaurant. This Act has, in turn, been passed by a number of the states. The intent of Congress and state legislatures in passing anti-injunction legislation along the lines of the Norris-LaGuardia Act certainly should be re-

guarded, if it is deemed relevant to inquire into "policies" concerning the area of allowable picketing.[7]

Thus, what appears to be the sole ground of this Honorable Court for concluding that the decision of the Texas Court in the instant case constituted a reasonable regulation of free utterance is completely without foundation.[8] That alone is, we submit, sufficient reason for a reconsideration and reversal of this Honorable Court's decision.

Let us inquire somewhat into the Court's statement as to what policy Texas sought to pursue in the instant case. It is said that Texas forbade the "conscription of neutrals".

We are not altogether certain who the "neutrals" in the instant case were. They might be the general public that passed the pickets, or the inside restaurant workers who quit their employment, or possibly Ritter himself.

Even more abstruse is the intended meaning of the word "conscription". Webster's New International Dictionary defines the verb "conscript" to mean "to enroll by compulsion for military service; to draft". The noun "conscript" is defined as "one compulsorily enrolled to serve as a soldier or sailor".

Even granting a wide poetic license to the phrase, we respectfully assert that there is nothing in this record to support a conclusion that either the inside restaurant workers or the general public were forced, or compelled, to aid the unions in their industrial dispute. If the phrase is intended to apply to Ritter, then the short answer is that Ritter was not a "neutral". As will subsequently be shown

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[7] One trag e effect of the determination in the *Ritter* case is that all state and even federal courts now construing state and federal anti-injunction acts broadly, consonant with the legislative purpose, may very well feel free to narrow their constructions to their individual views of what might constitute the area of allowable picketing.

[8] In addition to the cases above discussed, we respectfully direct the Court's attention to the recent decisions cited by Mr. Justice Reed in his dissent; (F. N. 6).

at greater length, Ritter was a primary disputant. Surely, it will not be denied that it was in Ritter's power to have the building which he owned constructed by a union contractor. This he failed to do, although, as expressly found by the court below, he was called upon by the business agents of the unions and was requested to require the use of union labor (R. 27),[9] a fact which is not alluded to in the majority opinion.

We have shown that the Court in the instant case gave excessive and unfounded weight to the powers of the State of Texas. The necessary corollary has been greatly and unprecedently to minimize the guarantees of the Bill of Rights. Perhaps nowhere in the majority opinion is this more patently demonstrated than in the closing, truncated quotation from the *Thornhill* case.

The Court pointed to the necessity of being

> "mindful that 'the rights of employers and employees to conduct their economic affairs and to compete with others for a share in the products of industry are subject to modification or qualification in the interests of the society in which they exist. This is but an instance of the power of the State to set the limits of permissible contest open to industrial combatants.'"

Surprisingly enough, however, Mr. Justice Frankfurter saw no need whatever of being mindful of the large and all-important qualification set forth in the next immediately following sentences of the *Thornhill* opinion (p. 104):

> "It does not follow that the State in dealing with the evils arising from industrial disputes may impair the effective exercise of the right to discuss freely industrial relations which are matters of public concern.

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[9] The opinion of this Honorable Court overlooks this most pertinent finding of fact. It shows quite conclusively that the unions had a direct and immediate grievance against Ritter.

> A contrary conclusion could be used to support abridgment of freedom of speech and of the press concerning almost every matter of importance to society."

The Court's approach in this case is directly at variance with the decision in the *Swing* case. There, it was held

> "That a state has ample power to regulate the local problems thrown up by modern industry and to preserve the peace is axiomatic. But not even these essential powers are unfettered by the requirements of the Bill of Rights. The scope of the Fourteenth Amendment is not confined by the notion of a particular state regarding the wise limits of an injunction in an industrial dispute, whether those limits be defined by statute or by the judicial organ of the state. A state cannot exclude workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him." Mr. Justice Frankfurter, p. 325.

Each and every word of the foregoing quotation applies directly and forcefully to the instant case. The decision in the instant case and that of the *Swing* case cannot possibly be reconciled, unless we accept the absurd conclusion that the Fourteenth Amendment has a different meaning when applied to the State of Texas than when applied to the State of Illinois. For surely, Illinois, under its police powers, had as much justification for "drawing the circle" as Texas, in the instant case, had to "draw the line." The Due Process Clause does not, quite obviously, accord greater sanction to Texas' "notion of * * * wise limits" than it does to that of Illinois. Upon the authority of the *Swing* case, therefore, the instant decision should be reversed.

respectfully submit, accounts for the peculiar and unwarranted limitations imposed upon picketing. Suffice it to say, without enumerating all the limitations expressed in, and inferable from, the majority opinion, that no other form of communication usually employed by persons and groups other than workingmen is subjected to a test remotely similar to the one imposed by the instant case—namely, that free speech as exercised by workingmen is constitutionally protected only "in circumstances where there exists 'on interdependence of economic interest of all engaged in the same industry' ".

We are told by the majority opinion that

> " • • • the circumstance that a labor dispute is the occasion of exercising freedom of expression does not give that freedom any greater constitutional sanction or render it completely inviolable."

We respectfully suggest that, under the holding and reasoning in the instant case, the Court has, in effect, ruled that the circumstance that a labor dispute is the occasion of exercising freedom of expression gives that freedom much lesser constitutional sanction and renders it almost completely violable.

Manifestly, there is no justification in constitutional law or elsewhere to deprive organized labor of its one traditional and characteristic mode of communication on the ground that "other traditional modes of communication" remain open.[13] The constitutional right established in the *Thornhill* case was the right "*effectively* to inform the public of the facts of a labor dispute." (Emphasis supplied.)

The picket established in front of the restaurant was the most effective communication available to petitioners. It was on this untenable ground—the effectiveness of the picket—that the lower court justified the injunction, and

[13] *Schneider* v. *State*, *supra*.

this, apparently, is the unsupportable basis for the majority opinion in the instant case.

Assuming the Validity of the Test, It Was Improperly Applied to the Facts of This Case.

It is readily demonstrable that regardless of the constitutional propriety of the test employed in the instant case, it was improperly applied to the facts of the case.

The Court has necessarily held that Ritter was not one of those engaged in the building industry. If he was, then clearly the Court would have been "confronted * * * with a limitation upon speech in circumstances where there exists an 'interdependence of economic interest of all engaged in the same industry,' " and, under the ruling of the Court, that limitation would be unconstitutional.

As we analyze it, then, the ruling of the Court, even assuming the validity of the test imposed, is necessarily dependent upon the conclusion that Ritter was not engaged in the building industry. That this conclusion is palpably erroneous is, we submit, self-evident. It is clear that Ritter is one of the "all engaged" in the building industry included in the instant case. He was the owner of the building at 2810 Broadway, Houston, Texas, and the person who awarded the contract for its construction.

The Court unrealistically and artificially separates a particular industry from the persons connected with it. It speaks of the absence of a "nexus" between the building industry and the restaurant industry but fails completely to see the obvious nexus between Ritter and both those industries. In so doing, the majority opinion uses language that fails to describe the true situation.

Thus, it is said that the unions sought to bring pressure "against a restaurant business, which, as a business, has no nexus with the building dispute but which *happens* to

be owned by a person who contracts with the builder." (Emphasis supplied.)

It would have been much more accurate, and much more consistent both with the record in this case and with common experience, to have said that the unions sought to announce their real and just grievance *against a person who, by his voluntary act, deprived their members of an opportunity to work on his building*, and this person, Ritter, *happens* to own a restaurant. The union was announcing what it conceived to be a just and bona-fide grievance against Ritter and it made that announcement at a place where it would prove most effective—his place of business which happened to be a restaurant.

The effort of the Court to distinguish the instant case from the *Wohl* case, is to leave state courts in hopeless confusion as to what this Court now holds. It is said that "the dispute there (the *Wohl* case) related to the conditions under which bakery products were sold and delivered to retailers. The business of the retailers was therefore directly involved in the dispute." Identically, the dispute in the instant case relates to conditions under which the construction of a building was sold to Ritter. The business of Ritter was, therefore, directly involved in the dispute. Plainly, the two cases cannot be distinguished on the ground that a building—unlike a bakery product—is not a mobile chattel and is incapable of being delivered. Ritter was no less a customer of Plaster than the retailer was of the peddler in the *Wohl* case.

Indeed, Ritter's relationship to the dispute and to the construction of the building at 2810 Broadway was much more obvious and direct than that of the retailers in the *Wohl* case to the business of delivering bakery products. As already observed, Ritter was directly responsible for the fact that non-union craftsmen were employed at that building. He created that condition by his own voluntary

act. He was in a position directly to have averted and altered that condition. The retailers in the *Wohl* case can hardly be said to have caused the union grievance there, or were hardly in a position directly to remedy that union grievance.

By no stretch of the imagination can it be said that any retailer in the *Wohl* case was more of a "real adversary" to the union in that case than Ritter was to the unions in the instant case. To suggest, as the majority opinion does, that Ritter was not a "real adversary" to the unions in the instant case is, we submit, to flout both the record and common experience.

The area of the building industry in which building craftsmen may successfully prosecute their grievances is, because of the essential and inherent nature of that industry, not fixed or static. It is necessarily flexible and depends upon and is coextensive with the activities of the owner of any given building operation.

It matters not to a union of building craftsmen—nor should it matter—that the owner of a building about to be constructed or is in process of construction or is fully erected, is a builder, a meat packer, a restauranteur, or is engaged in any other business or profession; nor does it matter that the particular building is a residential hotel, a meat warehouse, or a restaurant. What does matter is that the particular owner is in a position to have the building put up by union members under union conditions, or to have it put up by non-union members under non-union conditions.

Should such owner determine to employ non-union members, the unions have the constitutional right to communicate that fact to the public.

"Communication by such employees of the facts of a dispute, *deemed by them to be relevant to their interest, can no more be barred because of concern for*

the economic interest against which they are seeking to enlist public opinion than could the utterance protected in Thornhill's Case." Mr. Justice Frankfurter, *Swing, supra*, 326.

It is well known that building trades unions frequently approach the owner, rather than each possible contractor and subcontractor, in order to negotiate agreements. This is done because of obvious and practical considerations. Since the owner has it within his power to determine the working conditions of all the crafts engaged on a construction job, a single negotiation with him would dispose of the entire job. To negotiate with each contractor requires not only considerable time but also may, and frequently does, result in a situation wherein several of the crafts on a single job are unionized and others not, and such a situation is likely to result in stoppages and other conflicts.

It is well known that the building trades unions in every large city of the country maintain business representatives who call upon owners of prospective building operations to use union labor. It is well known, too, that craftsmen engaged in the building trades have but limited means of effectively announcing their grievances to the public because buildings are often erected for occupancy by tenants of the owner. Once the tenants occupy the building there is little use in picketing the building.

Likewise most buildings are erected for persons who are not engaged in a continuing building industry. For instance, there are large chain stores in the country who are continuously erecting buildings. Building craftsmen have found that the only effective means of inducing these large chain store owners to employ union craftsmen is for such craftsmen and their organizations to appeal to their fellow members and sympathizers not to do business with chain stores who will not erect their structures with union workers.

It is well known that to picket the contractor is in most

instances a useless task. Many contractors do not live in the city where the building operation is taking place. Likewise the local and small building contractor may have only one job in operation at one time, and there may be lapses of time between the finishing of one building and the commencement of another. If unionized building craftsmen are to obtain employment instead of non-union craftsmen, their most effective and usual means is to induce the owner of the building operation to employ union contractors who engage union help.

Does it not shock common sense and reason to hold that an owner who is engaged in several enterprizes such as operating a restaurant and a public garage, and who wishes to engage in a third enterprise, namely the operation of a motion picture business, and erects a third building for that purpose, cannot be picketed at the restaurant or at the garage by union building craftsmen who seek the work which the owner decides to give to non-union craftsmen? We are at a loss to know what the Court would hold in the event the so-called "real adversary", namely the contractor, were not within the sphere of dispute, in that the owner of the building operation directly employed non-union workers. In such a case could union workers picket him at his restaurant or at his garage? If they are allowed to picket him at the new building operation only, because the restaurant has no nexus with the building operation or the dispute concerning it, then what may we say at the building operation in the exercise of freedom of speech? May we add to the statement that here is a person, (giving his name), who is erecting this building with non union labor, a plea that those who sympathize with the cause of organized labor shall not patronize his restaurant? If we may not add the plea to the other portion of the announcement, may the announcement and all the picketing be prohibited because the people passing the building operation know that he is the man who

owns the restaurant and therefore cease patronizing him? It is hard to understand how the effect on the restaurant business of picketing the building operation can be severed so that the restaurant business will not be affected.

The truth is that the pronouncement affects Ritter who is the owner of the building operation, and since there is a nexus between Ritter and the dispute there is an absolute nexus between the restaurant and the building operation. Any business operation of Ritter's in the city of Houston at a time when he was engaged in the building operation, whether by direct hiring of non union labor or through a non union contractor has a nexus with said building operation and with the dispute respecting it. The unsupportable contention and the basic error of the Court is premised on its holding that Ritter's business, other than his business of erecting a building, has no nexus with the dispute. His various business enterprises cannot be separated from Ritter, and Ritter and his building operation has a nexus with the dispute and the industry in which it arose.

We are led to believe that the Court recognizes the truth of this assertion because it intimates that so far as Plaster was concerned, if he were engaged in other businesses and other industries he could have been picketed. The Court said:

> "• • • Texas has not attempted to protect other business enterprises of the building contractor, Plaster, who is the petitioners' real adversary."

It is most probable, State courts will construe the Ritter decision as prohibiting picketing of any business of Plaster outside the building industry.

The attempted insulation of Ritter from this controversy because he has employed a contractor to erect his building is wholly fallacious. It does not conform to the accepted method of doing business between owners of building opera-

tions and the workers employed or who seek employment in the building operation. Both state and federal governments, as owners of building operations, acknowledge that fact every day in the contracts entered into by them with contractors. In numerous contracts the Government specifies that the contractor must employ workmen who will be paid a specific wage and whose hours of work will be limited. Number of states and numerous municipalities provide that union labor shall be employed; others provide for prevailing wage scales which are to be determined on the basis of the union scale in the community. The Bacon Davis Act and the Walsh-Healey Act are premised upon that philosophy. In fact, some of these Acts permit the Secretary of Labor to place on a so-called blacklist contractors who have violated the terms and conditions provided by the Government, and when these contractors are so blacklisted they cannot receive a contract for the period of time they are on the blacklist in any enterprise they are engaged in, no matter how many different enterprises they are engaged in. Thus the contractor who is engaged in different industries in different cities is incapable of obtaining any government contract while he appears on the blacklist for any violation. This is a realistic recognition of "economic interdependence."

Under the instant decision, any builder in the State of Texas, who is engaged in another enterprise not directly connected with the building business,—and it is safe to prophesy that other states will soon follow in line—can apparently nullify constitutional rights by the simple device of having his buildings put up by a non-union contractor. By so doing, he normally saves himself money, since the wage costs of a union operation are generally higher than those of a non-union operation. At the same time, he is immunized against loss because usually the only effective

redress left to the union workers is to picket him at his place of business wherever that may be.

It is unrealistic to suggest the availability of a picket in front of the non-union construction job, since the non-union contractor doubtlessly has taken exceeding good care to employ workers who are apathetic or antipathetic to unionization. Moreover, a building in process of construction is not, of course, a business which is being patronized by the general public.

We respectfully urge that constitutional rights—particularly rights of free speech—do not hang on such exceedingly tenuous strands. The decision in the instant case will have the effect of depriving many thousands of organized building craftsmen of basic rights that are available to others.

Conclusion.

That the holding in the instant case is limited to the precise circumstances therein presented is necessary and usual, but a decision in a "concrete case" should not be dealt with "in the shallow belief that a case is a discreet phenomenon having neither genealogy nor offspring".[14]

We have already adverted to the "genealogy" of the instant decision. It derives from a culture pattern of hostility to organized labor which the judiciary of the land, in an effort to dignify it, converted into the "common law".

This judicial process prompted severe criticism by dissenting judges, informed laymen, scholarly investigators and responsive legislators. Resulting remedial legislation was often vitiated by adamant courts.[15]

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[14] Frankfurter, Cardozo and The Public Law, 52 Harvard Law Review, 462, 463.

[15] Frankel, Judicial Interpretation of Labor Laws (1939) 6 University of Chicago Law Review 577; Cooper, The Conviction of Peaceful Picketing (1936) 35 Mich. Law Review 73.

The Constitution being, of course, superior to the legislation of any state or Congress, organized labor thought that when the *Thornhill* decision was announced, it had at long last been granted a Magna Carta that would not prove wholly or partially illusory.

The decision in the instant case, however, can be fairly said to have made the freedom enjoyed under the *Thornhill* doctrine short-lived and transitory. State courts have evidenced a ready "zeal to pervert"[16] the free speech labor decisions of this Honorable Court, especially that of the *Meadowmoor* decision.[17] These same courts will seize upon both the holding and the language employed in the majority opinion in the instant case completely to emasculate the *Thornhill* doctrine. It is not mere rhetoric so to predict; the decision in the instant case will prove an effective opening wedge for the return of "Government by injunction".

We have refrained from making reference to or discussing the dissenting opinions of Mr. Justice Black and Mr. Justice Reed. The clear, logical and sound pronouncements set forth in those opinions are not met by the majority determination. One observation must be made, namely, the dissenting opinions are consistent with the recent opinions of this Court in the *Thornhill*, *Carlson* and *Swing* cases. The majority opinion does all but actually reverse them.

Respectfully submitted,

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[16] Frankfurter, *Meadowmoor*, supra, 298.

[17] See, Peaceful Picketing and The Constitutional Guarantee of Free Speech Since the Swing Case, 90 University of Pennsylvania Law Review, 201; 41 Columbia Law Review 727.

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Supreme Court of the United States

OCTOBER TERM, 1941.

No. 527.

CARPENTERS AND JOINERS UNION OF AMERICA, LOCAL No. 213, ET AL.,

Petitioners,

against

RITTER'S CAFE, ET AL.

BRIEF FOR AMERICAN CIVIL LIBERTIES UNION AS AMICUS CURIAE ON APPLICATION FOR REHEARING.

AMERICAN CIVIL LIBERTIES UNION
as Amicus Curiae.

OSMOND K. FRAENKEL,
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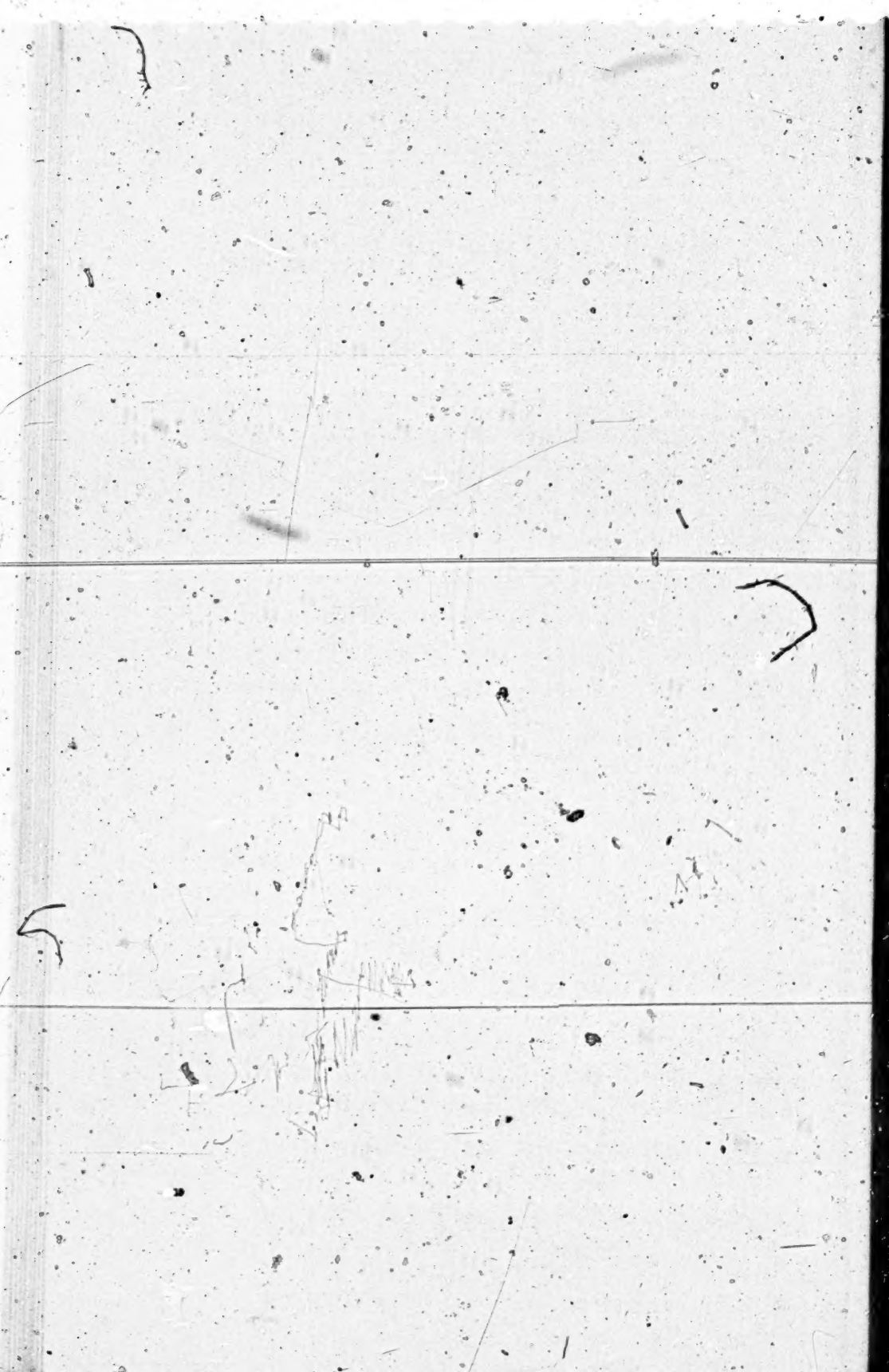

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RITTER'S CAFE, et al.

BRIEF FOR AMERICAN CIVIL LIBERTIES UNION AS AMICUS CURIAE ON APPLICATION FOR REHEARING.

The American Civil Liberties Union has for many years been concerned with limitations upon the rights of peaceful picketing which have so often been imposed both by statutes and by judicial decisions, believing that such picketing is one of the forms of freedom of speech and of the press guaranteed by the Constitution. In support of its concern with this subject it has urged the adoption by Congress of legislation which finally resulted in the Norris-LaGuardia Act and has sought to have similar laws enacted by various State legislatures. It also has from time to time filed briefs with this Court dealing with the subject, most particularly in the case of *Carlson* v. *California*,

which involved the constitutionality of a State statute banning all picketing and which, together with *Thornhill* v. *Alabama*, resulted in decisions holding such statutes unconstitutional (310 U. S. 88, 106).

We had supposed that these decisions had set at rest forever the notion that peaceful picketing could be banned because of any State policy which considered it harmful to business interests. It is true that in *Milk Drivers Union* v. *Meadowmoor Dairies, Inc.*, 312 U. S. 287, a majority of the Court indicated that different considerations might be applicable to injunctions than to statutes. However, in that case the Court was dealing with a situation in which the inference was permissible that past violence had rendered future peaceful picketing impossible. And the decision simultaneously rendered in *American Federation of Labor* v. *Swing*, 312 U. S. 321, indicated that the rule of the *Thornhill* and *Carlson* cases was applicable to injunctions as well as to statutes where no element of fraud or violence was involved. And this rule was announced even though in the *Swing* case the State had sought to sustain the injunction on the ground that its policy with regard to certain types of controversies justified that result.

The decision in the case at bar came, therefore, as a shock and a surprise. While it is evident from the decision simultaneously handed down in the *Wohl* case that this Court will not accept the State Court's view concerning the scope of the labor dispute involved as conclusive, the majority of the Court has, apparently, assumed the burden of deciding in each case whether the State's declaration of policy is sound. We respectfully suggest that this Court pause carefully before embarking on so difficult and troublesome a course, particularly when the constitutional requirements of the situation should make this inquiry irrelevant.

We submit that there are only two considerations which can ever justify restriction of speech and that neither of these is here present. The first relates to the content of the matter spoken or written, the second, to the accompanying circumstances. Here there can be no complaint concerning what was said. For any misstatement which originally was made in the placards (see R. 17) was corrected before the trial (R. 18) and the State Court did not rest its decision in any way upon the content of the placards (see R. 29, 31, 40). So the issue can be only that of the circumstances of the picketing.

And the only complaint with regard to these circumstances was that the picketing union had no dispute with plaintiff in his capacity as owner and operator of the restaurant at which the picketing took place. There was no finding of violence or threats of violence, there was no finding of any interference with traffic or with any of the rights of the public (R. 16-19). On the contrary, there was an express finding "that no violence attended the said picketing of plaintiff's cafe" (R. 19).

It was, therefore, only because of the relationship between the two parties, or lack of it, that the State Court condemned the picketing as "illegal" and "for an unlawful purpose" (R. 19). On that score many State courts have banned peaceful picketing in a great variety of circumstances. See Frankfurter and Green, The Labor Injunction (pp. 242 and following); Teller, Labor Disputes and Collective Bargaining, §123; Hellerstein, Secondary Boycotts in Labor Disputes, 47 Yale Law Journal 341; Galenson and Spector, The New York Labor Injunction Statute and the Courts, 42 Col. L. Rev. 51; Fraenkel, Judicial Interpretation of Labor Laws, 6 Univ. of Chic. L. R. 577, 6 I. J. A. Bull. 83.

Thus activities by labor unions have been declared illegal because engaged in to compel the use of live musicians instead of "canned music" (*Opera-on-Tour, Inc.* v. *Weber*,

285 N. Y. 348, cert. den. 314 U. S. ——), to endeavor to get persons to join a union (*Safeway Stores* v. *Retail Clerks Union*, 184 Wash. 322), to compel a closed shop (*Simon* v. *Schwachman*, 301 Mass. 573), to compel the employment of union help by someone who employs no help at all (*Thompson* v. *Boekhout*, 273 N. Y. 390). Injunctions have been granted banning picketing of the advertisers in a newspaper (*B. Gertz, Inc.* v. *Randau*, 162 N. Y. Misc. 786—but see *Davega* v. *Randau*, 166 N. Y. Misc. 246), against picketing a restaurant whose products were delivered in trucks operated by non-union drivers (*Chapman* v. *Doe*, 255 App. Div. 893), against picketing by rival unions (see *Canepa* v. *Doe*, 277 N. Y. 52; *American Guild of Musical Artists* v. *Petrillo*, 286 N. Y. 226).

The uncertainty of the considerations properly applicable to cases of this kind is reflected in these and other conflicting decisions noted by Galenson and Spector, supra, at pages 69-71, 74-77. These difficulties this Court will be called upon to resolve in an increasing number of instances if the decision in the case at bar is permitted to stand.

And, if peaceful picketing under the circumstances here disclosed may be enjoined, may the picket also be sent to jail? The opinion on rehearing below suggests that the picketing was in violation of the state anti-trust law (R. 40), which imposes criminal sanctions, Texas, Penal Code, §§1632-1635. And peaceful picketing has been punished as disorderly conduct solely because of the Court's view concerning the economic relation between the parties: *People* v. *Bellows*, 281 N. Y. 67,—but see *People* v. *Muller*, 286 N. Y. 281.

If peaceful picketing can be enjoined, and perhaps punished, because of the Court's view about the labor relationship involved, what about such activities when there is no such relationship at all? Indeed many courts have de-

clared such picketing unlawful (see 8 I. J. A. Bull. 124), as when directed by tenants against a landlord (*People v. Kopczak*, 153 N. Y. Misc. 187, affd. 266 N. Y. 565) or by groups having a political grievance (see 8 I. J. A. Bull. 114).

Moreover, if peaceful dissemination of opinion by means of placards is not protected by the Constitution under these various circumstances would distribution of leaflets be protected? And if not, we have here an opening wedge to the nullification of *Schneider* v. *Irvington*, 308 U. S. 147.

Although not all these variations of the problem appear to have been considered by this Court, the opinion of the majority of this Court seeks to lay down a standard for the resolution of the conflict posed by this experience. But in our judgment it has failed to accomplish this objective. For it speaks in terms of "economic context" and "conscription of neutrals", concepts so vague and uncertain, as the various decisions referred to show, as not to form a suitable basis for any restriction on free speech. Granted that the right to express an opinion may have to yield to considerations of public order, how can considerations of private gain alone be made the criterion? To adopt such a standard would go far to nullify the *Thornhill* and *Carlson* decisions.

We submit that the inquiry upon which the Court has here engaged is wholly at variance with the true meaning which should be given the constitutional guaranty of free speech. As this Court said in the *Bridges* case, 314 U. S. ——, that guaranty is an unequivocal one and "must be taken as a command of the broadest scope that explicit language, read in the context of a liberty loving society, will allow."

The difficulties inherent in the problem which the Court has assumed to resolve are made plain in the dissent of Mr. Justice Reed, the objections on broad constitutional grounds in that of Mr. Justice Black. In view of these dissents and the close division within the court and the

far-reaching implications of the majority decision, we respectfully urge the advisability of granting a rehearing in this case so that this Court may further consider the propriety and wisdom of adhering to the decision already rendered.

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION
as Amicus Curiae.

OSMOND K. FRAENKEL,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 527

CARPENTERS AND JOINERS UNION OF AMERICA, LOCAL No. 213 et al.
Petitioner

v.

RITTER'S CAFE et al.
Respondents

On Application for Rehearing

BRIEF ON BEHALF OF CONGRESS OF INDUSTRIAL ORGANIZATIONS AMICUS CURIAE

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STATEMENT

This brief is submitted amicus curiae on behalf of the Congress of Industrial Organizations, hereinafter referred to as the CIO. The CIO is an unincorporated association, composed of affiliated labor unions, with a membership of approximately 5,000,000. It embraces workers in such vital industries as coal mining, transportation, clothing, automobiles, rubber, steel, aluminum, and aviation.

Neither the defendant union nor any of the individual defendants in this case are affiliated with the CIO. This

brief is submitted to the court because the constitutional issue in this case is of such vital significance to the welfare of organized labor as a whole.

The CIO is deeply disturbed by the decision which has been rendered by this Court in this matter. The decision creates confusions and obscurities which leave labor in the dark as to the scope of the constitutional protection of its picketing rights. In the creation of those confusions and obscurities, moreover, the Court has departed very sharply from constitutional doctrines to which it has only recently recommitted itself.

Questions Raised by the Court's Decision.

It is regrettable that in deciding this case the Court has not clearly formulated the basic premises of its decision, nor more important, has it made clear the precise scope of the decision.

In the first succinct statement of the doctrine which it was enunciating the Court said:

> "... recognition of peaceful picketing as an exercise of free speech does not imply that the states must be without power to confine the sphere of communication to that directly related to the dispute." [62 S. Ct. 807, 810].

In what sense is the phrase "sphere of communication" intended? We must assume that the phrase is not intended to refer to the *substance* of the "communication." Certainly, in the absence of obscenity, falsehood, abusiveness, provocation, incitement or related considerations, none of which are claimed to be present here, the constitutional protection has never depended on the nature of the facts which are communicated. Certainly this Court has never said that certain facts may be the

subject of public communication or that other facts may not.

We must assume in short that this Court has not held that the State of Texas may prohibit the Union from any public intimation by printed or spoken word, by pamphlet, press, radio, or speech, of the fact that the non-union contractor, Plaster, has been hired by the restaurant owner, Ritter. We would make this assumption even in the absence of any guidance in the opinion. The indications in the opinion, however, support the assumption. The opinion, for example, carefully notes that:

> "The decree forbade neither picketing elsewhere (including the building under construction by Plaster) nor communication of the facts of the dispute by any means other than the picketing of Ritter's restaurant [62 S. Ct. at 808].

The Court further emphasized the consideration that:

> "The State has not attempted to outlaw whatever psychological pressure may be involved in the mere communication by an individual of the facts relating to his differences with another." [62 S. Ct. at 809].

Even more specifically:

> "Restriction of picketing to the area of the industry within which a labor dispute arises leaves open to the disputants other traditional modes of communication." [62 S. Ct. at 810]

The conclusion that the statements on the picket signs have been determined to be without constitutional protection, not because of their content, but because of the *locale* of the picketing does not dispose of the many questions raised and left unanswered by the Court's de-

cision. This Court has previously said in the case of *Schneider v. New Jersey*, 308 U. S. 147:

> "... The streets are natural and proper places for dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." [p. 163]

Thus the streets generally may not be closed to the dissemination of information and opinion simply because other places are available. Nor may certain streets be closed to dissemination of views simply because others are available. (*Hague v. CIO*, 307 U. S. 496.) Even more specifically this Court has determined, citing the quotation from the *Schneider* case supra, that even the general danger of breach of the peace at the scene of a labor dispute cannot warrant the closing of that place to dissemination of information and opinion:

> "It is not enough to say that Section 3448 is limited or restricted in its application to such activity as takes place at the scene of the labor dispute.... [quotation from *Schneider* case]. . . . The danger of breach of the peace or serious invasion of rights of property or privacy at the scene of a labor dispute is not sufficiently imminent in all cases to warrant the legislature in determining that such place is not appropriate for the range of activities outlawed by Section 3448". (*Thornhill v. Alabama*, 310 U. S. 88)

What then, is it that upholds the state in restricting utterances in the vicinity of the Ritter establishment? Is "the danger of breach of the peace or serious invasion of rights of property or privacy" so "imminent" in this case? There is not even any question of violence or breach of peace or serious invasion of property rights.

There is no background of violence nor is there any suggestion that there is any danger of violence (cf. *Milk Wagon Drivers Union v. Meadowmoor Dairies Inc.*, 312 U. S. 387).

In this instance the Court in its decision has turned to an entirely new concept in the constitutional law relating to free speech. A clue to the nature of this concept is found in the Court's reference to the power of the State "to confine the use of this industrial weapon within reasonable bounds" [62 S. Ct. at 809]. Further light is cast by the Court's reference to the action of the State as a prohibition of "the exertion of concerted pressure directed at" a person outside the direct employer-employee conflict. And again, in changed metaphor, the Court declares that to uphold the right of free speech before Ritter's establishment would be to compel the states to allow disputants to "conscript neutrals." This marks the first time in our constitutional history that in an analysis of the content of the free speech guarantee mere utterances have been viewed not as dissemination of opinion and information, but as an "industrial weapon" and as "concerted pressure" and as "conscription" of persons to whom those utterances are directed. This is an approach upon which this Court should not embark without very sober deliberation.

To "confine" the "industrial weapon," to prohibit the exertion of "concerted pressure" or the "conscription" of "neutrals", means, within the specific context of the case at bar, to prevent the use of that "weapon" and to prevent the application of that "pressure" against a particular individual or particular individuals. It means specifically in the present case that Texas may constitutionally prevent the application of that "weapon" to

Ritter or prevent the application of that "pressure" against Ritter.

But it must be recalled that the "pressure" and the "weapon" constitute nothing more than the dissemination of the fact that Ritter had employed a non-union contractor. If the dissemination of that fact, by virture of a sign carried by a picket, constitutes a "weapon" and a means of "pressure" or "conscription," the dissemination of that fact constitutes no less a "weapon" and a "pressure" and a "conscription" when accomplished by word of mouth, by pamphlet, by newspaper, or by radio. If in the words of this Court's opinion, the intention of Texas is to "insulate from the dispute an establishment", that insulation can be accomplished only by prevention of any public knowledge of the facts concerning the establishment which the union is attempting to bring to the attention of the public. There would be little room for distinction between the dissemination of that information by picket or by any other means.

Nor is it an answer to suggest that the picketing as a means of disseminating information is more effective as a "weapon" or as a means of "pressure" or "conscription". A letter directed to Ritter's customers, a newspaper distributed to Ritter's customers, a radio broadcast which reaches Ritter's customers, a street corner address heard by Ritter's customers can be presumed to have the same effect. Certainly the cases of *Thornhill* (supra) and *Carlson* (supra) and *A. F. of L. v. Swing*, 312 U. S. 321, make no distinction between picketing and other means of dissemination of information. We assume that this Court would not say that constitutional protection for dissemination of the information by newspaper or radio or street corner speech would depend

upon the extent to which the information disseminated had come to the attention of or might be expected to come to the attention of the persons most interested in it, Ritter's customers.

There is a basic and very dangerous fallacy in this doctrine that the dissemination of information may be "confined" or "prohibited" because the act of dissemination is viewed as a "weapon" or as a means of bringing "pressure." It cannot be too often repeated that the "weapon," if such it be called, consists merely of facts, information, and opinion and that the "pressure," if any results is the product merely of facts, information and opinion.

Facts, information and opinion do not constitute a peculiarly "industrial" weapon, nor are "pressures" resulting from them peculiar to the industrial field. Words and arguments are social weapons. It is precisely for that reason that they are accorded constitutional protection. It is because the clash of the "weapons" of argument in the arena of ideas (to rephrase an older metaphor in the shape of the new one which this Court's opinion has adopted) is regarded as the best means of developing the strongest democracy and is expected to result in the victory of the soundest argument that our constitution prohibits interference with that contest of ideas. Facts, information and ideas frequently result in action and action based on ideas and information frequently results in pressures in our society. Our constitution is based on the assumption that action instigated by ideas and information is desirable. It is precisely those "pressures" which are protected by the constitutional guarantee of free speech.

The Decisions of this Court on Picketing Rights.

The dangers implicit in the novel approach taken by the Court in its opinion in this matter point to a very dangerous departure from the basic doctrines of recent decisions.

In the *Thornhill* case, *supra*, this Court enunciated the foundation of constitutional protection for public discussion of matters of public concern:

> "The freedom of speech and of the press guaranteed by the Constitution embraces at the least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment." [310 U. S. at 101-102]

In the *Thornhill* case, *supra*, this Court enunciated the equally basic doctrine that industrial conditions and labor relations constitute matters of public concern within this fundamental constitutional protection:

> "The merest glance at State and Federal legislation on the subject demonstrates the force of the argument that labor relations are not matters of mere local or private concern. Free discussion concerning the conditions in industry and the causes of labor disputes appears to be indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society." [310 U. S. at 103]

Are there limitations on this liberty of public discussion of matters of public concern? Of course there are. The issue is not, as was suggested in this Court's opinion, [62 S. Ct. at 809] whether "peaceful picketing must be wholly immune from regulation by the com-

munity". This Court in the *Thornhill* case, supra, stated the normal limitations on all forms of public expression:

> "The power and the duty of the state to take adequate steps to preserve the peace and to protect the privacy, the lives, and the property of its residents, cannot be doubted. But no clear and present danger of a distruction of life or property, or invasion of the right of privacy, or breach of the peace can be thought to be inherent in the activities of every person who approaches the premises of an employer and publicizes the facts of a labor dispute involving the latter." [310 U. S. at 105]

The substantive evil to which any valid restriction of free speech must be directed must be one sufficiently grave to warrant an invasion of so vital a constitutional guarantee. This Court has thus far recognized only violence or a clear and present danger of it as such a justification.

Milk Wagon Drivers Union v. Meadowmoor, supra.

Thornhill v. Alabama, supra.

DeJonge v. Oregon, 299 U. S. 353.

The Court has specifically rejected cleanliness of the streets (*Schneider v. New Jersey*, supra,) or the mere general possibility of violence (*Thornhill v. Alabama, supra; A. F. L. v. Swing, supra; Cantwell v. Connecticut*, 310 U. S. 296) as justifications for restriction on the right of free speech through picketing or otherwise. Most important from the point of view of the nature of the restriction imposed in this case, this Court has rejected the economic consequences which may affect a given individual as the result of the truthful dissemination of facts as any justification for interference with the dissemination of those facts:

"The right of free communication cannot therefore be mutilated by denying it to workers in a dispute with an employer even though they are not in his employ. Communication by such employees of the facts of a dispute, deemed by them to be revelant to their interests, can no more be barred because of concern for the economic interests against which they are seeking to enlist public opinion than could the utterance protected in Thornhill's case." (*A.F.L. v. Swing, supra,* 312 U. S. at 326).

The Constitutional guarantee of free speech is one in which the mere legislative determination of desirable state policy is not paramount. On that subject, this Court said in *Schneider v. New Jersey, supra:*

"Mere legislative preferences or beliefs respecting matters of public convenience may well support legislation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions. And so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights". (308 U. S. at 147)

On the same subject, this Court said:

"Mere legislative preference for one rather than another means for combatting substantive evils, therefore, may well prove an inadequate foundation on which to rest regulations which are aimed at or in their operation diminish the effective exercise of rights so necessary to the maintenance of democratic institutions. It is imperative that, when the effective exercise of these rights is claimed to be abridged, the courts should 'weigh the circumstances' and

'appraise the substantiality of the reasons advanced' in support of the challenged regulations." (*Thornhill v. Alabama*, 310 U. S. at 95-6)

The Court in *A. F. L. v. Swing, supra*, said:

"The scope of the Fourteenth Amendment is not confined by the notion of a particular state regarding the wise limits of an injunction in an industrial dispute, whether those limitations be defined by statute or by the judicial organ of the state. A state cannot exclude working men from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him." [312 U. S. at 325-326]

CONCLUSION

The basic principles governing the exercise of free speech in this country are thus clear even if their application may be difficult in individual cases. A departure from them such as that contemplated in the present case is fraught with danger. To protect an individual from the social "pressure" of words emblazoned on a placard leads to protection of an individual from the social "pressure" of words on a printed page, and of the spoken word. It leads to that consequence unless we are to create distinctions between media of communication, or unless we are to draw tenuous lines based on the extent to which the communication may be deemed to be effective. And if the constitutional right to free speech is to be denied at the point where the exercise of free speech becomes effective to influence the actions of men, then the right to free speech is denied at the point where free speech becomes meaningful.

We respectfully submit that these are not the times

to embark upon these dangerous lines of thought. The decision of the Court in this case is fraught with those dangers. We respectfully urge that the Court reconsider its determination and upon reconsideration revise its conclusion in conformity with the important principles which this Court has affirmed in these last few years.

Respectfully submitted,

LEE PRESSMAN,
Attorney for Congress of Industrial Organizations, amicus curiae

LEE PRESSMAN
EUGENE COTTON
of Counsel

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Supreme Court of the United States

OCTOBER TERM 1941

No. 527

CARPENTERS AND JOINERS UNION OF AMERICA, LOCAL No. 213, et al.,

Petitioners,

vs.

RITTER'S CAFE, et al.

BRIEF ON BEHALF OF NEW YORK HOTEL TRADES COUNCIL, A. F. L., AND ILLINOIS STATE FEDERATION OF LABOR, *AMICI CURIAE*, IN SUPPORT OF APPLICATION FOR REARGUMENT

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We take it that on this application counsel are not expected to reargue the case as if reargument had been granted. Nor should the Court be burdened with a full argument of the entire case. This brief will, therefore, be limited strictly to pointing out why, in our opinion, a reargument should be granted.

Argument

A reargument should be granted, we respectfully submit, for the reason that the majority of the Court, in the decision handed down, proceeded upon an erroneous theory as to the main question that was before the Court for decision.

A reading of the opinion delivered by Mr. Justice Frankfurter indicates that the majority of the Court proceeded upon the theory that the question before the Court was as to the limits of permissible State action in a labor dispute.

But such was clearly not the case: The principal question, —if not the only one,—was as to the *nature of the means* which a State may employ in enforcing its policy, rather than as to its power generally in dealing with the subject of labor relations.

In other words, the question before the Court was and is: What, if any, are the constitutional limitations upon the choice of means by a State in the enforcement of its policy? Obviously, this is not the same question as that as to the limits of the competency of a State in declaring its policy with respect to labor relations,—which is the question with which the opinion of the majority of the Court deals. A State may have plenary powers to deal with the subject of labor relations,—in the sense of determining what is permissible for workers or their organizations to do without incurring liability to individuals or punishment by the State,—without being free to use a particular means of enforcing a policy which it was free to adopt. The constitutional limitations upon the policy, on the one hand, and those upon a principal means of enforcement, on the other, may depend upon different constitutional considerations.

This is such a case. The power to deal with labor relations is part of the general police power of the State,—using that term in its broad sense, in the classical formulation of Mr. Justice Taney, as "the power to govern men and things."

License Cases, 5 How. 503.

That the police power used in this comprehensive sense is not greater than when used in its narrow sense of providing for the "safety, health and good morals" of the community, is self-evident. Indeed, there are many things which the courts have held to be permissible in the latter sphere,—particularly in connection with the problem of "safety",—which would not be permissible in the sphere of ordinary governance. It is sufficient to point in this

connection to the cases arising under the federal Espionage Act passed during the last World War, and the cases arising under the so-called "criminal syndicalism" acts of various States. Those cases lay down certain limits to the freedom of speech and the press, dictated by the necessity to protect the "safety" of the nation or of the State, as the case may be. But no one would claim that those cases would warrant the institution of censorship either by the United States Government or by the government of any State.

It therefore follows, as a matter of course, that a State may not institute a *previous censorship* in order to enforce its ordinary powers to "govern men and things." But such, we respectfully submit, is the decree involved in this case. The correctness of that decree could not, therefore, be disposed of by a mere finding that the State had the power to declare the policy underlying that decree,—which is the purport of the opinion already rendered. The real question before the Court is: Assuming the power of the State to declare the policy underlying the decree, has the State the power to enforce it in the particular manner in which it sought to enforce it in the decree under review? And the answer to that question, we respectfully submit, must be in the negative.

POINT I

The question before the Court is not whether petitioners were free to do what they had been enjoined from doing, but whether the Texas court could *prevent* their action by *previous* order forbidding communication by the spoken or written word.

We respectfully submit that the majority of this Court, in the decision rendered, confounded the problem of whether or not the State of Texas could lay down a rule

whereby petitioners could not do the acts complained of without incurring *liability*, either to the defendant or to the State, with the problem whether the State could *forbid any communication by spoken or written word in order to prevent the thing for which petitioners would be liable under the declared policy of the State.*

In order to come to a proper decision in this case, it is, we respectfully submit, necessary to separate the problem as to what policy the State of Texas may adopt with respect to labor relations, from that of the means whereby it may *enforce* that policy. As we understand it, the Supreme Court of the State of Texas declared it to be either the statutory or common-law policy of that State that the owner of a restaurant who has no labor disputes with the employees of that restaurant, has a right to be free to enter into any contract he chooses with a building contractor, with respect to the erection of a building which has no relation to the conduct of the restaurant involved; and that a labor union composed of workers engaged in the building industry, has no right to invade that right, by appealing, either to the workers employed in the restaurant to quit work, or to the public not to patronize the restaurant. We assume, for the purpose of this argument, that there is nothing in the United States Constitution which would prevent the State of Texas from adopting such a policy. But the right to adopt such a policy is on an entirely different plane from the right to adopt *any means* of enforcing that policy. Such a policy might be enforced in at least three different ways:

1. The State might make labor unions, their members and officers, liable in damages to the party injured by conduct contrary to that policy.

2. The State might enact a penal statute declaring that whoever by word of mouth or in writing solicits, invites, or counsels another to violate the declared policy, is subject to fine or imprisonment.

3. The State might appoint a censor or board of censors, with power to censor all placards carried by pickets, prescribing punishment by fine or imprisonment for those carrying placards not approved by the censor or board of censors.

Obviously, the three methods of enforcing the declared public policy of the State are on different constitutional levels. We may assume that the first method would not be violative of any provision of the United States Constitution. Whether or not the second method would be violative of the constitutional guarantee against the abridgement of the freedom of speech or of the press, would probably depend on a number of factors which cannot be gone into here. We must, however, refer briefly to the basic principles involved, since there is some difference of opinion on the subject.

On the general question of the meaning of the constitutional guarantees against the abridgement of freedom of speech or of the press, there are two currents of thought, one of which may be called the English school, and the other the American school. Not that adherents of the one school are Englishmen, and those of the other Americans. Rather, the adherents of the first school believe that the guarantees contained in the American constitutions, including the Constitution of the United States, were intended to *preserve* inviolate the results which had been achieved in the course of centuries in the long struggle waged in England for freedom of speech and of the press; while the second school believes that the purpose of those guarantees was not merely to preserve but to *extend* the freedoms gained in England to new fields, and to establish the freedom of speech and of the press in this country on a level beyond that which had been achieved in England at the time of our Revolution. The law as it stood in England at the time of our Revolution was thus stated by Mr. Justice Blackstone:

"In this and the other instances which we have lately considered, where blasphemous, immoral, treasonable, schismatical, seditious, or scandalous libels are punlished by the English law, some with a greater, others with a less, degree of severity; the *liberty of the press*, properly understood, is by no means infringed or violated. The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraint upon publications, and not in freedom from censure for criminal matters when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous, or illegal, he must take the consequence of his own temerity."

Blackstone's Commentaries, Cooley's American Edition, Book IV, p. 151.

The American concept of freedom of the press was thus stated by Judge Cooley:

"Freedom of the press.—De Lolme, who wrote upon the Constitution of England just before the meeting of the Constitutional Convention, and who undertook to gather from the common law the meaning of this among other principles of liberty, has expressed his conclusion thus: 'The liberty of the press as established in England consists in this, that neither the courts of justice, nor any other judges whatever, are authorized to take notice of writings intended for the press, but are confined to those which are actually printed, and must in these cases proceed by the trial by jury.' Mr. Justice Blackstone adopted this view as undoubtedly correct, and in this country it has been accepted as expressing the views of those who framed and adopted this amendment. If it expresses their views fully, we must conclude that the amendment is aimed only at such censorship of the press as had sometimes been exercised in England, and to some extent in the Colonies also, and that, forbidding this, and leaving every one to publish what he might please, it left him, at the same time, to such responsibility for his publication as the law might provide.

It seems more than probable, however, that the Constitutional freedom of the press was intended to mean something more than mere exemption from censorship in advance of publication. Such censorship had never been general in the Colonies: It did not exist at all at the time of the Revolution, and there was no apparent danger of its ever being restored. To forbid it, therefore, and especially just at a time when the people had been taking a larger share in the government into their own hands, and when the command would be laid on their own representatives, would appear to savor somewhat of idle ceremony. But the history of the times shows that the people believed a right of publication existed which might be invaded and abridged by oppressive prosecution and by laws which admitted the liberty to publish, but enlarged beyond reason the sphere of responsibility; and the evils they feared had no necessary connection with any established or threatened censorship."

Cooley, Constitutional Law, 3rd Edition, Chapter XIV, Section V, Freedom of Speech and of the Press.[1]

This Court has never, as far as we know, expressed any opinion on the merits of the respective claims of these two schools of thought; although the decisions of this Court clearly indicate that it is the so-called "American doctrine" rather than the "English doctrine" that is the doctrine of our constitutional law. In this connection, it is well to refer to the opinion delivered by Mr. Justice Holmes on behalf of this Court in the well known case of *Patterson* v. *Colorado.* In that opinion, Mr. Justice Holmes said:

"In the first place, the main purpose of such constitutional provisions is to 'prevent all such *previous restraints* upon publications as had been practiced by other governments', and they do not prevent the sub-

[1] In this connection, Cooley's definition of "the press" should be noted. This is stated in the same work as follows:

"The freedom of the press is not limited to any particular form or method of publication, but it extends to all modes of putting facts, views, and opinions before the public. Books, pamphlets, circulars, etc., are therefore as much within it as periodical issues."

> sequent punishment of such as may be deemed contrary to the public welfare. Com. v. Blanding, 3 Pick. 304, 313, 314, 15 Am. Dec. 214; Republica v. Oswald, 1 Dall. 319, 325, 1 L. ed. 155, 158, 1 Am. Dec. 246."
>
> *Patterson* v. *Colorado*, 205 U. S. 454, 462.

It will be noted that Mr. Justice Holmes said that the prevention of previous restraints was the "main" purpose of the constitutional guarantees, but not their only purpose. Clearly, we have left Mr. Justice Blackstone behind, even though it is not quite clear how far forward we have gone.

POINT II

Texas cannot enforce its labor relations policy by instituting a censorship.

Whatever differences of opinion there may be as to the extent of the limitations put upon federal action by the First Amendment to the United States Constitution, and upon state action by the Fourteenth Amendment, it is clear that neither government can enforce any of its policies by instituting a censorship over the spoken or written word. Therefore—

Whatever the labor relations policy of Texas may be, it cannot enforce it instituting a censorship to prevent speech or writing contrary to that policy.

We take it that no one would dispute that point, when thus stated. But, clearly, if that point is not disputed, the majority opinion of the Court already rendered in this case, does not deal with the problem actually before the Court, and has not touched upon the point which *is* before the Court. In his opinion on behalf of the majority, Mr. Justice Frankfurter said:

> "In the circumstances of the case before us Texas has declared that its general welfare would not be served if, in a controversy between a contractor and

> building workers' unions, the unions were permitted to bring to bear the full weight of familiar weapons of industrial combat against a restaurant business, which, as a business, has no nexus with the building dispute but which happens to be owned by a person who contracts with the builder. The precise question is, therefore, whether the Fourteenth Amendment prohibits Texas from drawing this line in confining the area of unrestricted industrial warfare."

We respectfully submit that this is *not* the question before the Court. The question before this Court is not whether the State of Texas can declare the conduct of the petitioners tortious, so as to carry financial liability to the person injured, or criminal, so as to make those guilty of it liable to punishment by the State, but *whether it can prevent the action by establishing a censorship over the spoken or written word.* For it is only with respect to concededly improper or illegal use of speech or writing that the question of constitutional guarantees comes into play. And it is settled that whatever the limits of these constitutional limitations, *they unquestionably cover previous restraints.* Mr. Justice Holmes, speaking for this Court, said in the opinion already quoted from:

> *"The preliminary freedom extends as well to the false as to the true;* the subsequent punishment may extend as well to the true as to the false." (Italics supplied throughout, unless stated otherwise.)
>
> *Patterson* v. *Colorado,* 205 U. S. 454, 462.

It is thus clear that in order to be protected against preliminary restraint, action need not be in accord with public policy. For the constitutional protection applies not only to what is proper, but also to what is improper, and even to what is criminal.

Indeed, we doubt very much whether anyone would dispute this proposition if the Legislature of the State of Texas had done what the courts of that State have done in this case. The record in this case shows that—

"After the hearing of said cause on the trial on the merits, the trial court entered its decree thereon permanently enjoining the appellants from picketing or causing to be picketed, * * * and from carrying banners peacefully and in any other manner upon the sidewalks in front of 418 Broadway Street *with the words and inscriptions thereon as set forth in the Court of Civil Appeals findings of fact * * * and with any other words or inscriptions thereon*" (Record, p. 20).

Clearly, if the State of Texas had employed any other method, but that of a court decree, to prevent in advance the speaking or writing sought to be prevented by this decree, its unconstitutionality would have been self-evident. Does the fact that the attempt to *prevent* speech or writing is embodied in a court decree change the situation? We respectfully submit that it does not.

POINT III

What the state legislature cannot do, the state courts may not do.

It is settled law that the prohibitions of the Fourteenth Amendment with respect to what the States may not do apply equally to all state agencies, and that what a state legislature cannot do the state courts may not do.

Ex parte Virginia, 100 U. S. 339;
Neal v. *Delaware*, 103 U. S. 370;
Yick Wo v. *Hopkins*, 118 U. S. 356;
Scott v. *McNeal*, 154 U. S. 34;
Gibson v. *Mississippi*, 162 U. S. 565;
Chicago B. & Q. R. Co. v. *Chicago*, 166 U. S. 226.

In the last case cited this Court said:

"But it must be observed that the prohibitions of the Amendment refer to all the instrumentalities of the state, to its legislative, executive, and judicial au-

thorities, and, therefore, whoever by virtue of public position under a state government deprives another of any right protected by that Amendment against deprivation by the state, 'violates the constitutional inhibition; and as he acts in the name and for the state, and is clothed with the state's power, his act is that of the state'. *This must be so, or, as we have often said, the constitutional prohibition has no meaning, and 'the state has clothed one of its agents with power to annul or evade it'.*"

Chicago B. & Q. R. Co. v. *Chicago,* 166 U. S. 226, 233.

See also:

No. Am. Cold Storage Co. v. *Chicago,* 211 U. S. 306;
Home T. & T. Co. v. *Los Angeles,* 227 U. S. 278;
Georgia Power Co. v. *Decatur,* 281 U. S. 505.

POINT IV

The prohibition in advance by injunction is censorship.

The general principle laid down by the cases just cited, to the effect that the courts of a State may not do what either the Legislature or any other state agency could not do, has been specifically and repeatedly applied by the courts to cases of injunctions. The rule that the courts will not enjoin a libel is familiar, but its very familiarity has largely obscured its source,—which is, that to enjoin the publication of a libel is violation of the principle against censorship, that the written or spoken word *may only be punished afterwards, but cannot be prevented in advance.* But there is at least one case that we know of in which this source of the rule is clearly stated; and the rule itself applied notwithstanding very serious considerations urged against its application in the particular case.

In a case which arose in the courts of the State of Missouri, the plaintiff sought to enjoin a course of action

on the part of the defendant which involved the repeated publication of scurrilous and libelous matter, and special reasons were urged for the granting of the injunction. The relief was denied by the court of first instance, and the decision was affirmed on appeal. In affirming the decision, the appellate court said:

> "No case is cited by the learned counsel for the appellant in which the jurisdiction here claimed has been exercised. All that they venture to suggest is that the various English courts which have refused to exercise such a jurisdiction have placed their refusal on grounds which do not make such refusal certainly apposite to the circumstances shown by the petition. The refusal has been uniform. The reasons assigned for it have been various, according to the peculiarities of the cases in which they were given. To argue from the qualifications of so many concurring refusals that it may be inferred that, but for the qualifications, the refusals would not have been made, would be an exceedingly unsafe line of argument anywhere. In Missouri, where we are expressly forbidden by the Constitution to assume the power we are asked by the plaintiff to exercise, our answer could not be doubtful. It is hardly necessary to quote the familiar language of our organic law, which has always declared 'that every person may freely speak, write, or print on any subject, being responsible for the abuse of that liberty'.
>
> If it be said that the right to speak, write, or print, thus secured to everyone, cannot be construed to mean a license to wantonly injure another, and that by the jurisdiction claimed it is only suspended until it can be determined judicially whether the exercise of it in the particular case be allowable, *our answer is that we have no power to suspend that right for a moment, or for any purpose. The sovereign power has forbidden any instrumentality of the government it has instituted to limit or restrain this right except by the fear of the penalty, civilly or criminally, which may wait on abuse.* The General Assembly can pass no law abridging the freedom of speech or of the press; it can only punish the licentious abuse of that freedom. *Courts of justice* can only administer the laws of the State, and, of course, *can do nothing by way of judicial*

sentence which the General Assembly has no power to sanction. The matter is too plain for detailed illustration."

Life Ass. v. *Boogher,* 3 Mo. App. 173, 179-180.

The principle that the courts cannot enjoin in advance any speech or writing, was enforced most emphatically in a notable case which arose in the courts of the State of California, in which the action of the court of first instance, in issuing such an injunction, was reversed by the highest court of the State. In that case, the lower court had issued an order enjoining the performance of a theatrical production based upon the facts of a case which was then pending in the criminal courts of the State. The action of the highest court of the State of California in that case in reversing that order is particularly significant, because the action complained of tended to interfere with the proper administration of justice, and, unquestionably, the courts could have punished the performance as a contempt of court. Nevertheless, the attempt to *prevent* in advance the threatened publication was considered an infringement upon the constitutional principle which does not permit *previous restraint* of publications, even though their nature be such that they could be punished *afterwards.* The point involved is thus stated in the headnote to the case:

"An order of the Superior Court forbidding the representation upon the theatrical stage of the facts of a criminal case, pending the trial of such case, is an infringement of Section 9, Article 1, of the Constitution of this State, which protects the right of the citizen to freely speak, write, and publish his sentiments, without censorship over him, he being responsible only at the hands of the law for an abuse of that right; and such order, being in excess of the jurisdiction of the Superior Court, will be annulled upon certiorari."

Dailey v. *Superior Court,* 112 Cal. 94.

And in the opinion in that case, the Supreme Court of California said:

"The production of a tragedy or comedy upon the theatrical stage is a publication to the world by word of mouth of the text of the author, and, as to the question here presented for our consideration, it is immaterial whether the words be publicly spoken from the stage or upon the hustings, or go out to the world through the channels of the printing press. By the constitutional provision we are about to invoke a citizen may speak, write, or publish his sentiments with equal freedom, and this case now stands before us exactly as though one of the daily journals was threatening to publish its sentiments pertaining to the conduct of a criminal trial then pending, and the court where such trial was pending and in progress, believing such publication would interfere with the due administration of justice, had issued an order restraining and prohibiting the threatened action of the paper.

We are entirely clear that the court had no jurisdiction to make the order which forms the basis of this proceeding, for such order was an attempted infringement upon rights guaranteed to every citizen by Section 9, Article 1, of the Constitution of this State. That Section provides: 'Every citizen may speak freely, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press.' The wording of this Section is terse and vigorous, and its meaning so plain that construction is not needed. The right of the citizen to freely speak, write, and publish his sentiments is unlimited, but he is responsible at the hands of the law for an abuse of that right. He shall have no censor over him to whom he must apply for permission to speak, write, and publish, but he shall be held accountable to the law for what he speaks, what he writes, and what he publishes. *It is patent that this right to speak, write, and publish, cannot be abused until it is exercised, and before it is exercised there can be no responsibility. The purpose of this provision of the Constitution was the abolishment of censorship, and for courts to act as censors is directly violative of that purpose.*"

Dailey v. *Superior Court*, 112 Cal. 94, 96-97.

And in support of the proposition that the prohibition against censorship applies to the courts as well as to other organs of the State, the Court cited the following from Mr. Justice Story's work on the Constitution:

> "Indeed, the liberty of the press, as understood by the law of England, is the right to publish without any previous restraint or license; so that *neither the courts of justice* nor other persons are authorized to take notice of writings intended for the press; but are confined to those which are printed."
>
> *Story on the Constitution,* Section 1885.

And in another case which arose in the courts of the State of Missouri the principle was applied to a labor case. In that case, an injunction was obtained by an employer against a labor union, on a principle similar to the one upon which the decree under consideration was granted by the Texas court. In reversing the decree granting the injunction, the Supreme Court of Missouri quoted the following from Judge Cooley's work on Constitutional Limitations:

> "It is also sometimes expressly declared—what indeed is implied without the declaration—that everything in the declaration of rights contained is excepted out of the general powers of government, and all laws contrary thereto shall be void. * * * While they continue in force they are to remain absolute and unchangeable rules of action and decision."
>
> *Cooley's Const. Lim.* (6 Ed.), p. 48.

It then proceeded to say:

> "The rights then set forth and designated in Section 14 are '*excepted out of the general powers of the government;* all laws contrary thereto are void, and so long as such provisions of the Bill of Rights continue in force they remain absolute and unchangeable rules of action and decision.' And, as the learned author and eminent jurist just quoted says in another place with great force: 'The securities of individual right

• • • cannot be too frequently declared, nor in too many forms of words; nor is it possible to guard too vigilantly against the encroachments of power nor to watch with too lively a suspicion the propensity of persons in authority to break through the cob-web chains of paper Constitutions.' (2 Story's Const. [Cooley's Ed.], Sec. 1938.) • • •

Section 14, supra, makes no distinction and authorizes no difference to be made by courts or legislatures between a proceeding set on foot to enjoin the publication of a *libel*, and one to enjoin the *publication of any other sort or nature, however injurious it may be*, or to prohibit the use of free speech or free writing on any subject whatever; because wherever the authority of *injunction begins*, there the right of free speech, free writing or free publication *ends*. No halfway house stands on the highway between *absolute prevention* and *absolute freedom*. The rights established by Section 14 can neither be impaired by the legislature, nor hampered nor denied by the courts." (Italics in the original.)

Marx & Haas Jeans Clothing Company v. *Watson*, 168 Mo. 133, 145, 149.

CONCLUSION

It is therefore clear that the question of the right of the State of Texas to set a limit to the right of the labor union and its members with respect to parties claiming not to be involved in a labor dispute, does not include the right of its courts to prohibit in advance, by a decree, any speech or writing which contravenes its policy in that regard. The latter question, which is the only question before this Court, depends upon entirely different principles. And a consideration of those principles, and of the adjudicated cases dealing with the same, would, we respectfully submit, establish that the decree appealed from is in the nature of censorship, and therefore offends the guarantees contained in the United States Constitution against the infringement of the freedom of speech and of the freedom of the press by the States. Reargument is therefore clearly called for.

Dated: April, 1942.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1941.

No. 527.

CARPENTERS AND JOINERS UNION OF AMERICA, LOCAL No. 213, *et al.*,

Petitioners,

against

RITTER'S CAFE, *et al.*

MOTION FOR LEAVE TO FILE BRIEF *and* BRIEF ON BEHALF OF THE NATIONAL LAWYERS GUILD, AS *AMICUS CURIAE* ON APPLICATION FOR REHEARING.

Abraham J. Isserman
NATIONAL LAWYERS GUILD,
as Amicus Curiae.

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3 I. J. A. Bull. 113 (May 1940) 3

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OCTOBER TERM, 1941.

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CARPENTERS AND JOINERS UNION OF AMERICA, LOCAL No. 213, *et al.*,
Petitioners,

against

RITTER'S CAFE, *et al.*

MOTION FOR LEAVE TO FILE BRIEF.

MAY IT PLEASE THE COURT:

The National Lawyers Guild respectfully moves this Honorable Court for leave to file the accompanying brief in support of the petition for re-hearing now pending before the court.

The National Lawyers Guild has observed with gratification the broadening of the rights of the people in their struggle for economic betterment through the decisions of this court which held that the Fourteenth Amendment protected from abridgment the effective exercise of the rights of free speech and of liberty of communication through picketing. Particularly, reference is made to the court's decisions in the cases of *Thornhill* v. *Alabama*, 310 U. S. 88, *Carlson* v. *California*, 310 U. S. 106 and *American Federation of Labor* v. *Swing*, 312 U. S. 221.

The National Lawyers Guild believes that the decision in the instant case is regressive, and in sharp derogation of

the constitutional principles declared in the above cases. Within the several states it threatens, to the detriment of labor, a serious curtailment of the allowable area of economic conflict in labor controversies. In its wider implications it threatens a general abridgment of the allowable area of free speech.

The National Lawyers Guild is deeply concerned over the effect of the instant decision, if unchanged, upon the morale of the working men of this country who voluntarily refrain from exercising the very rights which are now subjected to arbitrary abridgment. This blow at their rights can neither be welcomed or supported. It cannot be expected to stimulate labor's contribution to our country's total effort to preserve its democracy from its external enemies.

Consent to the filing of this brief has been requested of the respective parties. The petitioner, Carpenters and Joiners Union of America, has given its consent. As yet no reply has been received from the respondents. In any event, because of the importance of the issues involved and the deep interest which the members of the National Lawyers Guild have in these issues, it is urged that the accompanying brief be considered by this Honorable Court.

NATIONAL LAWYERS GUILD
as *Amicus Curiae*

By its Committee On Labor Law
DAVID SCRIBNER
Secretary.

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 527.

CARPENTERS AND JOINERS UNION OF AMERICA, LOCAL No. 213, *et al.*, Petitioners,

against

RITTER'S CAFE, *et al.*

BRIEF ON BEHALF OF THE NATIONAL LAWYERS GUILD AS *AMICUS CURIAE* ON APPLICATION FOR REHEARING.

The National Lawyers Guild had believed, and still does, that the *Thornhill, Carlson* and *Swing* cases witnessed a favorable climax to labor's long struggle to have its traditional methods of communication of matters of fact and opinion by means of the carrying of placards or picketing, declared to be within the protection of the Fourteenth Amendment and thus secure against abridgment by the states. Peaceful picketing, unaccompanied by falsehood or threat, had indeed advanced from a "sinister name to constitutional right." (See discussion under that title in *8 I. J. A. Bull. 113, May 1940.*)

The language of this court in these cases was unequivocal.

> "The carrying of signs and banners, no less than the raising of a flag, is a natural and appropriate

means of conveying information on matters of public concern." *Carlson* case, *supra*, at pages 112-113.

This language was in further amplification of the court's previous statement that the Fourteenth Amendment protected "every sort of publication which affords a vehicle of information and opinion". *Lovell* v. *Griffin*, 304 U. S. 444, 452. It was made clear, too, that the carrying of signs in the exercise of free speech was appropriate on the streets which, in recognition of previous holdings of this court, were described as "natural and proper places for the dissemination of information and opinion". It was further held that their use could not be prohibited on the plea that liberty of expression "may be exercised in some other place". *Lovell* v. *Griffin*, *supra*, *Schneider* v. *Irvington*, 308 U. S. 147, and *Hague* v. *CIO*, 307 U. S. 496.

The instant decision brushes aside these basic precepts and is in part predicated on the finding that the decision of the Texas court "leaves open to the disputants other traditional modes of communication."

The *Thornhill*, *Carlson* and *Swing* decisions do not permit the construction which the majority opinion has adopted in the instant case, which in effect limits picketing as an appropriate means of conveying information "on matters of public concern" to labor disputes alone, however broadly the term may be defined.

> "The freedom of speech and of the press guaranteed by the Constitution embraces *at least* the liberty to discuss publicly and truthfully *all* matters of public concern without previous restraint or fear of subsequent punishment." *Thornhill* case, *supra*, p. 101.

From the *Thornhill* and *Carlson* cases and the free speech and press cases which preceded them, it became abundantly clear that the Fourteenth Amendment pro-

tected newspapers, leaflets and placards, distributed or exhibited to persons at their homes or to the public on the streets, without regard to whether the information or matters of opinion which were being disseminated were in the "context" of a labor, political, religious or economic controversy.

Granted that the peaceful carrying of a truthful sign is a vehicle for the dissemination of matters of fact and opinion, there can be no limitation on the nature or type of *occasion* in connection with which speech is exercised in that form. While peaceful picketing or the carrying of placards is truly, as Justice Frankfurter described it, "the workingman's means of communication" *Milk Wagon Drivers, etc.* v. *Meadowmoor Dairies*, 312 U. S. 287, 293, there is no constitutional reason why it could not be indulged in by a priest protesting the showing of a motion picture believed obscene, by a consumer protesting the high cost of bread, by a citizen having some public grievance, or by the members of the petitioning unions in this case, whether or not their controversy with Ritter is defined as a labor dispute.

If the union can constitutionally state its message on the radio, in a newspaper advertisement, in a leaflet, or by mail, why may it not constitutionally use a placard for the same purpose, and carry that placard wherever citizens may lawfully be?

The cases prior to the present decision gave careful consideration to the effect on the right to picket, of the damage resulting to the person picketed. No excuse for state action abridging the constitutional right of the exercise of speech through picketing was found, as long as the picketing was peaceful and truthful. The damage, if any, was held to result from the competition of conflict-

ing ideas for "acceptance in the market place of public opinion".

The damage to Ritter in the instant case resulted only from the publication of the facts concerning the unions' controversy with him. Yet the Texas court (R. 40) relied on the damage to Ritter caused by the unions' peaceful picketing to establish a violation of the Texas anti-trust statutes. It found that the picketing was an attempt "to create restrictions in the free pursuit" by Ritter of his business, and that Ritter had suffered some economic loss. There was no finding that the public safety or welfare was in any way endangered by the controversy. However, the majority opinion of this court holds that the immunity given to Ritter by the Texas court from the exercise of speech by the unions, was a translation into law of the policy of the State of Texas "to promote the health, safety, morals and general welfare of its people". The majority opinion thus ignored the more precise principles of the *Thornhill* and other cases which prevent restrictions on free speech merely because of possible consequent damage to the person picketed, and which permit state regulation only to prevent "substantive evils" to the community in the face of "clear and present danger".

This court in the case of *Bakery & Pastry Drivers, etc. v. Wohl*, No. 901 (*10 LLR, 210*), decided the same day as the instant case applied the test to the state prohibition on picketing which it applied in the *Thornhill* case. As in the *Wohl* case here is "no substantive evil of such magnitude as to mark a limit to the right of free speech which the petitioners sought to exercise." As in the *Wohl* case, the record in this case "does not contain the slightest suggestion of embarrassment in the task of governance;" as in the *Wohl* case "there are no findings and no circumstances from which we can draw the inference that the

publication was attended or likely to be attended by violence, force or coercion, or conduct otherwise unlawful or oppressive." As in the *Wohl* case, "it is not indicated that there was an actual or threatened abuse of the right to free speech through the use of excessive picketing."

The picketing of customers and of suppliers in the *Wohl* case was justified in part because of the "respondents' mobility and their insulation from the public as middlemen" which "made it practically impossible for petitioners to make known their legitimate grievances to the public." Plaster, the contractor in the present case, too, was a middleman. In carrying out his business he moves from job to job and he, too, is "insulated from the public" as far as a union appeal for support is concerned. Ritter, the owner of the land and building under construction, was not so insulated and was vulnerable to public feeling and action, particularly because of his restaurant business.

The majority opinion states that the dispute concerned merely "the labor conditions surrounding the construction of a building by a contractor", and that Plaster, the contractor, was the petitioner's "real adversary". This, we respectfully submit, does not give full value or weight to the facts as found by the Texas court. Ritter was a customer of Plaster. But more than that, he created the situation which gave rise to Plaster's hiring of non-union help for the construction of the Ritter building. The Texas court found (R. 27) "that the business agents of the defendant unions called upon plaintiff (Ritter) and asked that a provision be inserted in said contract requiring the contractor to use union labor on said job." It was Ritter's apparent refusal to insert such clause in his contract which created the dispute between him and the building unions. Thereafter (R. 27), when Plaster commenced operations under the contract, the dispute involved Plaster as well.

It was always in Ritter's power to correct this situation, albeit some additional expense might have been involved. He refused. He was and remained the "real adversary". The unions, in traditional fashion, sought to advise those members of the public who were likely to do business with Ritter, of the facts of their dispute with Ritter and incidentally with Plaster.

The majority opinion found that the restaurant business "has no *nexus* with the building dispute". While in the light of the constitutional principles the right to tell the truth peacefully cannot and should not be limited because of the nature of the relationship between the parties, or because of the absence thereof, there is sufficient in this case to establish that the unions had in fact a labor controversy with Ritter, and that the "*nexus*" between the restaurant business and the building operation was Ritter's sole ownership of both enterprises. The picketing was directed against Ritter in furtherance of a dispute with Ritter. It was conducted against Ritter at the place where it would be most effective.

If any real point of distinction can be found between the *Wohl* case and the instant case, it is that in the instant case the picketing which was suppressed was very effective and that in the *Wohl* case it was ineffective. The warning sounded by Justice Douglas in his concurring opinion in the *Wohl* case should be heeded. Testing the constitutionality of picketing from the standpoint of its effectiveness is indeed "a basic departure from *Thornhill* v. *Alabama* . . .".

That the majority opinion reflects such consideration is emphasized by the description of the picketing as an effort "to conscript neutrals". Justice Frankfurter in the *Swing* case, upholding the right of employes to communicate facts "deemed by them to be relevant to their interests", described the picketing in that case as an effort "to enlist

public opinion". The change in phraseology is significant, but in each case the union engaged in nothing but the peaceful carrying of placards which told the truth. Ritter was certainly no neutral. But public discussion, and the dissemination of information or the expression of opinion in public, is inevitably directed at "neutrals". The effort on both sides in an industrial dispute is to stimulate these neutrals into sympathetic support. The use of the word "conscript" is undoubtedly intended to indicate coercion, or at least some form of external compulsion. But there is no finding of fact by the Texas court which indicates any effort to coerce the public into abandoning its neutrality. The sole effort was to persuade the public to support the unions in their grievance against Ritter, not by conscription but rather by enlistment of its sympathy.

The many decisions referred to as embracing "probably the unanimous policy of the states" as forbidding "conscription of neutrals", or in other words, peaceful picketing, bear the further study and analysis of this Honorable Court. Most of them are no longer authority in the states in which they were rendered. Most of them were decided before the beneficent effects on labor's rights of the *Thornhill* and *Carlson* cases had permeated to the states. Most of them are supplanted by direct reversals or by subsequent decisions which have accepted and followed the mandates of the *Thornhill* and *Carlson* cases that truthful, peaceful picketing is a form of speech and as such beyond the reach of the restrictive power of state legislatures and courts. Such more recent cases include the following:

Kerns v. *Landgraf*, 128 N. J. Eq. 441;
Kingston Trap Rock v. *International*, 129 N. J. Eq. 570;

Heine's, Inc. v. *Truck Drivers, etc.*, 129 N. J. Eq. 308;

Feller v. *International Ladies' Garment Workers Union*, 129 N. J. Eq. 421;

Lora Lee v. *International Ladies' Garment Workers Union*, 129 N. J. Eq. 368;

Ellingson v. *Milk Drivers*, 377 Ill. 76;

International Association v. *Pauly Jail Building Co.*, 118 F. (2d) 615 (C. C. A. 8);

Alliance Auto Service v. *Cohen*, 341 Pa. 283;

Taxicab Drivers Local v. *Yellow Cab*, 123 F. (2d) 263 (C. C. A. 10);

People v. *Muller*, 286 N. Y. 281;

Fortenbury v. *Superior Court*, 16 Cal. (2d) 405;

American Federation of Labor v. *Bain; Congress of Industrial Organizations* v. *Bain*, 165 Or. 183;

People v. *Bashaw*, 295 Mich. 576;

McKay v. *Retail Automobile Salesmen's Local Union*, 16 Cal. (2d) 311; certiorari denied 313 U. S. 566;

Shafer v. *Registered Pharmacists Union*, 16 Cal. (2d) 379;

E. H. Renzel Co. v. *Warehousemen's Union*, 16 Cal. (2d) 369;

Lund v. *Auto Mechanics' Union*, 16 Cal. (2d) 379;

C. S. Smith Metropolitan Market Co. v. *Lyons*, 16 Cal. (2d) 389;

Denver Local Union No. 13, etc. v. *Perry Truck Lines*, 106 Colo. 25;

O'Neill v. *Building Service Employees*, 9 Wash. (2d) 507.

It is apparent that the decision in the instant case as it now stands is in sharp conflict with the previous decisions of this Honorable Court on the subject of peaceful picketing. These previous decisions have had a profound effect upon decisions in state courts. Many of these have opened wide to labor and labor's supporters the channels of free communication best adapted to labor's needs. Confidence in the courts and respect for the courts has consequently increased. On all sides, violence and threats of violence in labor controversies have been reduced. Yet, the process of recognizing the Fourteenth Amendment as a shield for labor's right to express itself peacefully and truthfully through picketing, has not been completed. Its completion has been suspended in large part by labor's voluntary abnegation of its rights in deference to the primary need of winning the war against the Axis powers. As a result there are few cases in the courts today involving picketing, and most of those, if not all (as does this one), antedate Pearl Harbor.

While labor is thus concentrating on the war effort, are its rights to peaceable action and persuasion to remain in jeopardy?

Is labor to be faced again with employer oppression, emboldened and strengthened by injunctions of a state court issued under the color of promoting "the health, safety, morals and general welfare of its people . . .", but which in actuality would only prevent labor from telling the public the truth through "the workingman's means of communication"—peaceful picketing?

The importance of the issues, the obvious conflict with prior decisions, the probable error in this court's appraisal of the facts below, and the sharp division in this court, all point to the urgent necessity for a reconsideration by this

Honorable Court of its decision. The motion for rehearing should be granted.

Respectfully submitted,

NATIONAL LAWYERS GUILD
as *Amicus Curiae*

By its Committee On Labor Law
DAVID SCRIBNER
Secretary.

P. 1, Black

SUPREME COURT OF THE UNITED STATES.

No: 527.—October Term, 1941.

Carpenters and Joiners Union of America, Local No. 213, et al., Petitioners,
vs.
Ritter's Cafe, et al.

On Writ of Certiorari to the Court of Civil Appeals for the First Supreme Judicial District of Texas.

[March 30, 1942.]

Mr. Justice Frankfurter delivered the opinion of the Court.

The facts of this case are simple. Ritter, the respondent, made an agreement with a contractor named Plaster for the construction of a building at 2810 Broadway, Houston, Texas. The contract gave Plaster the right to make his own arrangements regarding the employment of labor in the construction of the building. He employed non-union carpenters and painters. The respondent was also the owner of Ritter's Cafe, a restaurant at 418 Broadway, a mile and a half away. So far as the record discloses, the new building was wholly unconnected with the business of Ritter's Cafe. All of the restaurant employees were members of the Hotel and Restaurant Employees International Alliance, Local 808. As to their restaurant work there was no controversy between Ritter and his employees or their union. Nor did the carpenters' and painters' unions, the petitioners here, have any quarrel with Ritter over his operation of the restaurant. No construction work of any kind was performed at the restaurant, and no carpenters or painters were employed there.

But because Plaster employed non-union labor, members of the carpenters' and painters' unions began to picket Ritter's Cafe immediately after the construction got under way. Walking back and forth in front of the restaurant, a picket carried a placard which read: "This Place is Unfair to Carpenters and Joiners Union of America, Local No. 213, and Painters Local No. 130, Affiliated with American Federation of Labor." Later on the wording was changed as follows: "The Owner of This Cafe Has Awarded a Contract to Erect a Building to W. A. Plaster Who is Unfair to the Carpenters Union 213 and Painter Union 130, Affiliated With

the American Federation of Labor." According to the undisputed finding of the Texas courts, which is controlling here, Ritter's Cafe was picketed "for the avowed purpose of forcing and compelling plaintiff [Ritter] to require the said contractor, Plaster, to use and employ only members of the defendant unions on the building under construction in the 2800 block on Broadway." Contemporaneous with this picketing, the restaurant workers' union, Local No. 808, called Ritter's employees out on strike and withdrew the union card from his establishment. Union truck drivers refused to cross the picket line to deliver food and other supplies to the restaurant. The effect of all this was "to prevent members of all trades-unions from patronizing plaintiff's cafe and to erect a barrier around plaintiff's cafe, across which no member of defendant unions or an affiliate will go." A curtailment of sixty per-cent of Ritter's business resulted.

Holding the petitioners' activities to constitute a violation of the state anti-trust law, Texas Penal Code, Art. 1632 *et seq.*, the Texas Court of Civil Appeals enjoined them from picketing Ritter's Cafe. The decree forbade neither picketing elsewhere (including the building under construction by Plaster) nor communication of the facts of the dispute by any means other than the picketing of Ritter's restaurant. 149 S. W. 2d 694. We brought the case here to consider the claim that the decree of the Court of Civil Appeals (the Supreme Court of Texas having refused a writ of error) infringed the freedom of speech guaranteed by the Due Process Clause of the Fourteenth Amendment. 314 U. S. —.

The economic contest between employer and employee has never concerned merely the immediate disputants. The clash of such conflicting interests inevitably implicates the well-being of the community. Society has therefore been compelled to throw its weight into the contest. The law has undertaken to balance the effort of the employer to carry on his business free from the interference of others against the effort of labor to further its economic self-interest. And every intervention of government in this struggle has in some respect abridged the freedom of action of one or the other or both.

The task of mediating between these competing interests has, until recently, been left largely to judicial lawmaking and not to legislation. "Courts were required, in the absence of legislation, to

determine what the public welfare demanded;—whether it would not be best subserved by leaving the contestants free to resort to any means not involving a breach of the peace or injury to tangible property; whether it was consistent with the public interest that the contestants should be permitted to invoke the aid of others not directly interested in the matter in controversy; and to what extent incidental injury to persons not parties to the controversy should be held justifiable." Mr. Justice Brandeis in *Truax* v. *Corrigan*, 257 U. S. 312, 363. The right of the state to determine whether the common interest is best served by imposing some restrictions upon the use of weapons for inflicting economic injury in the struggle of conflicting industrial forces has not previously been doubted. See Mr. Justice Holmes in *Aikens* v. *Wisconsin*, 195 U. S. 194, 205, and Mr. Justice Brandeis in *Truax* v. *Corrigan*, *supra*, at 372, *Dorchy* v. *Kansas*, 272 U. S. 306, 311, and *Senn* v. *Tile Layers Protective Union*, 301 U. S. 468, 481. But the petitioners now claim that there is to be found in the Due Process Clause of the Fourteenth Amendment a constitutional command that peaceful picketing must be wholly immune from regulation by the community in order to protect the general interest, that the states must be powerless to confine the use of this industrial weapon within reasonable bounds.

The constitutional right to communicate peaceably to the public the facts of a legitimate dispute is not lost merely because a labor dispute is involved, *Thornhill* v. *Alabama*, 310 U. S. 88, or because the communication takes the form of picketing, even when the communication does not concern a dispute between an employer and those directly employed by him. *American Federation of Labor* v. *Swing*, 312 U. S. 321. But the circumstance that a labor dispute is the occasion of exercising freedom of expression does not give that freedom any greater constitutional sanction or render it completely inviolable. Where, as here, claims on behalf of free speech are met with claims on behalf of the authority of the state to impose reasonable regulations for the protection of the community as a whole, the duty of this Court is plain. Whenever state action is challenged as a denial of "liberty", the question always is whether the state has violated "the essential attributes of that liberty". Mr. Chief Justice Hughes in *Near* v. *Minnesota*, 283 U. S. 697, 708. While the right of free speech is

embodied in the liberty safeguarded by the Due Process Clause, that Clause postulates the authority of the states to translate into law local policies "to promote the health, safety, morals and general welfare of its people. . . . The limits of this sovereign power must always be determined with appropriate regard to the particular subject of its exercise." *Ibid.*, at 707. "The boundary at which the conflicting interests balance cannot be determined by any general formula in advance, but points in the line, or helping to establish it, are fixed by decisions that this or that concrete case falls on the nearer or farther side." *Hudson Water Co.* v. *McCarter*, 209 U. S. 349, 355.

In the circumstances of the case before us Texas has declared that its general welfare would not be served if, in a controversy between a contractor and building workers' unions, the unions were permitted to bring to bear the full weight of familiar weapons of industrial combat against a restaurant business, which, as a business, has no nexus with the building dispute but which happens to be owned by a person who contracts with the builder. The precise question is, therefore, whether the Fourteenth Amendment prohibits Texas from drawing this line in confining the area of unrestricted industrial warfare.

Texas has undertaken to localize industrial conflict by prohibiting the exertion of concerted pressure directed at the business, wholly outside the economic context of the real dispute, of a person whose relation to the dispute arises from his business dealings with one of the disputants. The state has not attempted to outlaw whatever psychological pressure may be involved in the mere communication by an individual of the facts relating to his differences with another. Nor are we confronted here with a limitation upon speech in circumstances where there exists an "interdependence of economic interest of all engaged in the same industry", *American Federation of Labor* v. *Swing*, 312 U. S. 321, 326. Compare *Journeymen Tailors Union Local No. 195* v. *Miller's, Inc.*, 312 U. S. 658, and *Bakery & Pastry Drivers and Helpers Local No. 802* v. *Wohl*, decided this day. The line drawn by Texas in this case is not the line drawn by New York in the *Wohl* case. The dispute there related to the conditions under which bakery products were sold and delivered to retailers. The business of the retailers was therefore directly involved in the dispute. In picketing the retail establishments the union members would only be following the sub-

ject-matter of their dispute. Here we have a different situation. The dispute concerns the labor conditions surrounding the construction of a building by a contractor. Texas has deemed it desirable to insulate from the dispute an establishment which industrially has no connection with the dispute. Texas has not attempted to protect other business enterprises of the building contractor, Plaster, who is the petitioners' real adversary. We need not therefore consider problems that would arise if Texas had undertaken to draw such a line.

It is true that by peaceful picketing workingmen communicate their grievances. As a means of communicating the facts of a labor dispute, peaceful picketing may be a phase of the constitutional right of free utterance. But recognition of peaceful picketing as an exercise of free speech does not imply that the states must be without power to confine the sphere of communication to that directly related to the dispute. Restriction of picketing to the area of the industry within which a labor dispute arises leaves open to the disputants other traditional modes of communication. To deny to the states the power to draw this line is to write into the Constitution the notion that every instance of peaceful picketing—anywhere and under any circumstances—is necessarily a phase of the controversy which provoked the picketing. Such a view of the Due Process Clause would compel the states to allow the disputants in a particular industrial episode to conscript neutrals having no relation to either the dispute or the industry in which it arose.

In forbidding such conscription of neutrals in the circumstances of the case before us, Texas represents the prevailing, and probably the unanimous, policy of the states.[1] We hold that the Constitution does not forbid Texas to draw the line which has been drawn here. To hold otherwise would be to transmute vital constitutional liberties into doctrinaire dogma. We must be mindful that "the rights of employers and employees to conduct their economic affairs and to compete with others for a share of the products of industry are subject to modification or qualification in the interests of the society in which they exist. This is but an instance

[1] The authorities are collected in Teller, Labor Disputes and Collective Bargaining (1940), sec. 123; Hellerstein, Secondary Boycotts in Labor Disputes, 47 Yale L. J. 341; Frey, Cases on Labor Law (1941), pp. 239-73; cf. Galenson and Spector, The New York Labor-Injunction Statute and the Courts, 42 Col. L. Rev. 51, 68-71.

of the power of the State to set the limits of permissible contest open to industrial combatants." *Thornhill* v. *Alabama*, 310 U. S. 88, 103-04.

It is not for us to assess the wisdom of the policy underlying the law of Texas. Our duty is at an end when we find that the Fourteenth Amendment does not deny her the power to enact that policy into law.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 527.—October Term, 1941.

Carpenters and Joiners Union of America, Local No. 213, et al., Petitioners,
vs.
Ritter's Cafe, et al.

On Writ of Certiorari to the Court of Civil Appeals for the First Supreme Judicial District of Texas.

[March 30, 1942.]

Mr. Justice Black, dissenting, with whom Mr. Justice Douglas and Mr. Justice Murphy concur.

The petitioners sought to convey to the public certain information. The injunction here sustained imposed two restraints on their doing so: (1) it enjoined them from picketing the respondent's cafe; (2) it enjoined them from carrying banners in front of the respondent's cafe, banners which contained inscriptions telling the public that the respondent had awarded a building contract to a man who was unfair to organized labor.

One member of the petitioner unions at a time peacefully walked in front of the respondent's cafe, carrying such a banner. It is not contended that the inscriptions were untruthful, nor that the language used was immoderate. There was no violence threatened or apprehended. Passers-by were not molested. It is clear from the opinion of the Texas Court of Civil Appeals that the injunction against picketing was granted, not because of any law directly aimed at picketing as such—Texas has no statute against picketing—nor to prevent violence, disorder, breach of the peace, or congestion of the streets. The immediate purpose of the injunction was to frustrate the union's objective of conveying information to that part of the public which came near the respondent's place of business, an objective which the court below decided was a violation of Texas antitrust laws. Conveying this truthful information in the manner chosen by the union was calculated to, and did, injure the respondent's business. His business was injured because many of those whom the information reached were sympathetic with the union side of the controversy and declined to patronize the respondent's cafe or have any other business transactions with him. Does injury of this kind to the respondent's business justify the Texas courts in thus restricting freedom of expression?

I am unable to agree that the controversy which prompted the unions to give publicity to the facts was no more than a private quarrel between the union and the non-union contractor. Whether members or non-members of the building trades unions are employed is known to depend to a large extent upon the attitude of building contractors. Their attitude can be greatly influenced by those with whom they do business. Disputes between one or two unions and one contractor over the merits and justice of union as opposed to non-union systems of employment are but a part of the nationwide controversy over the subject. I can see no reason why members of the public should be deprived of any opportunity to get information which might enable them to use their influence to tip the scales in favor of the side they think is right.

If there had been any doubt before, I should have thought that our decision in *Thornhill* v. *Alabama*, 310 U. S. 88, settled the question. There we said at pages 102-104: "In the circumstances of our times, the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution. . . . Free discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the process of popular government to shape the destiny of modern industrial society. The issues raised by regulations, such as are challenged here, infringing upon the right of employees effectively to inform the public of the facts of a labor dispute are part of this larger problem. . . . It may be that effective exercise of the means of advancing public knowledge may persuade some of those reached to refrain from entering into advantageous relations with the business establishment which is the scene of the dispute. . . . But the group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests."

Whatever injury the respondent suffered here resulted from the peaceful and truthful statements made to the public that he had employed a non-union contractor to erect a building. This information, under the *Thornhill* case, the petitioners were privileged to impart and the public was entitled to receive. It is one thing for a state to regulate the use of its streets and highways so as

to keep them open and available for movement of people and property, *Schneider* v. *State*, 308 U. S. 147, 160; or to pass general regulations as to their use in the interest of public safety, peace, comfort, or convenience, *Cantwell* v. *Connecticut*, 310 U. S. 296, 306-307; or to protect its citizens from violence and breaches of the peace by those who are upon them, *Thornhill* v. *Alabama*, *supra*, 105. It is quite another thing, however to "abridge the constitutional liberty of one rightfully upon the street to impart information through speech or the distribution of literature. . . ." *Schneider* v. *State*, *supra*, 160. The court below did not rest the restraints imposed on these petitioners upon the state's exercise of its permissible powers to regulate the use of its streets or the conduct of those rightfully upon them. Instead, it barred the petitioners from using the streets to convey information to the public because of the particular type of information they wished to convey. In so doing, it directly restricted the petitioners' rights to express themselves publicly concerning an issue which we recognized in the *Thornhill* case to be of public importance. It imposed the restriction for the reason that the public's response to such information would result in injury to a particular person's business, a reason which we said in the *Thornhill* case was insufficient to justify curtailment of free expression.

The injunction is defended, however, on the ground that the petitioners have been prohibited from passing information to the public at only some, but not at all places. It may be that the petitioners are left free to inform the public at other places or in other ways. Possibly they might, at greater expense, reach the public over the radio or through the newspapers, although if the theory of the court below be correct, it would seem that they could be enjoined from using these means of communication, too, to persuade people not to patronize the respondent's cafe. In any event, "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider* v. *State*, *supra*, 163.

Accepting the Constitutional prohibition against any law "abridging the freedom of speech or of the press"—a prohibition made applicable to the states by the Fourteenth Amendment—"as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow", *Bridges* v. *California*, 314 U. S. —, I think the judgment should be reversed.

SUPREME COURT OF THE UNITED STATES.

No. 527.—October Term, 1941.

Carpenters and Joiners Union of America, Local No. 213, et al., Petitioners,
vs.
Ritter's Cafe, et al.

On Writ of Certiorari to the Court of Civil Appeals for the First Supreme Judicial District of Texas.

[March 30, 1942.]

Mr. Justice Reed, dissenting.

The Texas court enjoined petitioners, a labor union of carpenters and joiners, another union of painters, and all of their members from picketing the restaurant of the respondent, E. R. Ritter, plaintiff below, doing business under the trade name of Ritter's Cafe at 418 Broadway, in Houston, "and from carrying banners peacefully and in any other manner upon the sidewalks in front" of the restaurant. There had been no violence. Only two pickets, one from each union, walked back and forth, carrying placards which before the injunction issued were modified to read, "The Owner of This Cafe Has Awarded a Contract to Erect a Building to W. A. Plaster Who is Unfair to the Carpenters Union 213 and Painter Union 130, Affiliated with the American Federation of Labor."

Plaster, a building contractor, was putting up a structure for respondent, Ritter, in the 2800 block of Broadway, under a contract which did not require Plaster to employ union labor. The record does not show whether or not this new building is to be used in the restaurant business. He was employing non-union workers. The restaurant, however, was unionized, its employees being members of Hotel and Restaurant Employees' Local 808. They quit on the day the picketing began, union drivers refused to deliver supplies, and the business slumped sixty per cent. The court found petitioners' conduct an invasion of respondents' right to conduct a legitimate business and an attempt to interfere illegally with a contract with third parties.

The injunction was issued by the Texas court because such invasion or attempt at invasion of the rights of a business man was held "to create restrictions in the free pursuit" of business contrary to the Texas anti-trust laws. Tex. Rev. Civ. Stat. (Vernon, 1936) Arts 7426, 7428; Tex. Penal Code (Vernon, 1936) Arts. 1632, 1634, 1635. 149 S. W. 2d 694. The petitioners' challenge to the validity of the injunction is based on the constitutional right of free speech guaranteed them by the Fourteenth Amendment to the Constitution of the United States. *Schneider* v. *State*, 308 U. S. 147, 160.

This challenge involves two particularly delicate relationships. These are that between the federal and state governments and that between a state and labor unions within its borders. So far as the injunction depends upon the action of the Texas court in construing its anti-trust statutes to forbid such interference with the restaurant business, the order is unassailable here. But if such an interpretation denies to Texans claimed rights guaranteed to them by the federal Constitution, the state authority must accommodate its orders to preserve that right. Cf. *International Harvester Co.* v. *Kentucky*, 234 U. S. 216; *Lindsey* v. *Washington*, 301 U. S. 397, 400; *Minnesota* v. *Probate Court*, 309 U. S. 270, 273.

Recent cases in this Court have sought to make more definite the extent and limitations of the rights of free speech in labor disputes. For some time there has been general acceptance of the fundamental right to publicize "the facts of a labor dispute in a peaceful way through appropriate means." One of the recognized means is by orderly picketing with banners or placards. *Thornhill* v. *Alabama*, 310 U. S. 88, 104. In *Carlson* v. *California*, 310 U. S. 106, 113, we said: "For the reasons set forth in our opinion in *Thornhill* v. *Alabama, supra*, publicizing the facts of a labor dispute in a peaceful way through appropriate means, whether by pamphlet, by word of mouth or by banner, must now be regarded as within that liberty of communication which is secured to every person by the Fourteenth Amendment against abridgment by a State." The desire of both sides in labor controversies to gain advantages for themselves and limit similar opportunities for their opponents has led each to seek to expand or contract the constitutionally protected area for picketing operations as suits their respective purposes. Recognition of the basic right to picket made the location of lines beyond which picketing could

not be employed an important objective of those who suffer from its use.

In the *Carlson* and *Thornhill* cases legislation forbidding picketing for the purpose of interfering with the business of another was invalidated because it was an unconstitutional prohibition of the worker's right to publicize his situation. It was not thought of sufficient importance in either case to mention in the opinion whether the picket was an interested disputant with those picketed or an utter stranger to the controversy and the indusfry. In those carefully phrased decisions the possibility of state control of socially menacing evils, flowing from industrial disputes, was recognized, but those general evils were not of the kind which were considered to warrant interference with free speech by peaceful picketing.[1] We said:

"It is true that the rights of employers and employees to conduct their economic affairs and to compete with others for a share in the products of industry are subject to modification or qualification in the interests of the society in which they exist. This is but an instance of the power of the State to set the limits of permissible contest open to industrial combatants. See Mr. Justice Brandeis in 254 U. S. at 488. It does not follow that the State in dealing with the evils arising from industrial disputes may impair the effective exercise of the right to discuss freely industrial relations which are matters of public concern. A contrary conclusion could be used to support abridgment of freedom of speech and of the press concerning almost every matter of importance to society."[2]

An instance of state control over peaceful picketing soon appeared. In *Drivers Union* v. *Meadowmoor Co.*, 312 U. S. 287, this Court, though not without dissent, upheld Illinois' ruling that where "acts of picketing in themselves peaceful" are enmeshed in violence, immediate future peaceful picketing may be enjoined. This decision compelled a less extreme result in *Hotel & Restaurant Employee's Int'l Alliance* v. *Wisconsin Employment Relations Board*, No. 124 this Term, decided March 2, 1942. In the latter case, the order approved "forbids only violence" and "permits peaceful picketing." Nothing more than the validity of prohibitions against violence was decided as to the constitutionality of the Wisconsin Employment Peace Act.

[1] Evidently the conception was that of "imminent and aggravated damage," A. F. of L. v. Swing, 312 U. S. 321, 325.

[2] 310 U. S. 88, 103-104.

On the same day that *Meadowmoor* was handed down, *A. F. of L.* v. *Swing*, 312 U. S. 321, was decided. In *Swing's* case a union of beauty shop workers picketed a beauty parlor. They were not and had not been employees of the establishment. We stated the issue thus:

"More thorough study of the record and full argument have reduced the issue to this: is the constitutional guaranty of freedom of discussion infringed by the common law policy of a state forbidding resort to peaceful persuasion through picketing merely because there is no immediate employer-employee dispute?"[3] There was nothing in the opinion to intimate that the answer would have varied, if the union had been a local of the teamsters or painters. The injunction granted by Illinois was set aside with these words:

"Such a ban of free communication is inconsistent with the guaranty of freedom of speech. That a state has ample power to regulate the local problems thrown up by modern industry and to preserve the peace is axiomatic. But not even these essential powers are unfettered by the requirements of the Bill of Rights. The scope of the Fourteenth Amendment is not confined by the notion of a particular state regarding the wise limits of an injunction in an industrial dispute, whether those limits be defined by statute or by the judicial organ of the state. A state cannot exclude workingmen from peacefully exercising the right of free communication by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him. The interdependence of economic interest of all engaged in the same industry has become a commonplace. *American Steel Foundries* v. *Tri-City Council*, 257 U. S. 184, 209. The right of free communication cannot therefore be mutilated by denying it to workers, in a dispute with an employer, even though they are not in his employ. Communication by such employees of the facts of a dispute, deemed by them to be relevant to their interests, can no more be barred because of concern for the economic interests against which they are seeking to enlist public opinion than could the utterance protected in *Thornhill's* case. 'Members of a union might, without special statutory authorization by a State, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution.' *Senn* v. *Tile Layers Union*, 301 U. S. 468, 478."[4]

Today this Court decides *Bakery & Pastry Drivers & Helpers Local 802* v. *Wohl*, No. 901 of the October Term 1940. In this case

[3] 312 U. S. 321, 323.

[4] 312 U. S. 321, 325-326.

the union picketed manufacturing bakers who sold to and threatened to picket grocers and retail bakers who bought from peddlers. The peddlers purchased bakery goods and sold them to the trade. The labor controversy was the effort of the unions to compel the peddlers to hire a union driver one day a week. The state forbade the picketing of the manufacturers and of the retailers, regardless of whether the picketing placards were directed at the product or the general business of the retailers.[5] Although there is no possible labor relation between the peddlers and their customers or between the grocers and retail bakers and the union, we decline to permit New York to take steps to protect the places of business of those who dealt with the peddlers against picketing. It seems obvious that the selling of baked products, distributed by the peddlers is a minor part of the grocery business. Recent cases illustrate the present tendency of state courts to permit workers outside the industry picketed to publicize their labor disputes with others.[6] To permit the *Wohl* injunction, without evidence of special embarrassment to peace and order would, we hold, go beyond permissible limitations on free speech.

We are of the view that the right of free speech upheld in the decisions requires Texas to permit the publicizing of the dissatisfaction over Mr. Ritter's contract for his new building. Until today orderly, regulated, picketing has been within the protection of the Fourteenth Amendment. Such picketing was obviously disadvantageous to the business affected. In balancing social advantages it has been felt that the preservation of free speech in labor disputes was more important than the freedom of enterprise from the burdens of the picket line. It was a limitation on state power to deal as it pleased with labor disputes; a limitation con-

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[5] "It is hereby ordered, . . . that the defendants, . . . are perpetually restrained and enjoined:

(a) From picketing the places of business of manufacturing bakers who sell to the plaintiffs . . . because of the fact that said manufacturing bakers sell to these plaintiffs; and

(b) From picketing the places of business of customers of these plaintiffs because such customers purchase baked products from these plaintiffs; . . . ."

[6] People v. Harris, 104 Colo. 386, 91 P. 2d 989 (May, 1939); Byck Bros. & Co. v. Martin, 4 C. C. H. Labor Cases ¶ 60,430 (Ky. Cir. Ct., March, 1941); Ellingsen v. Milk Wagon Drivers' Union, 377 Ill. 76, 35 N. E. 2d 349 (June, 1941); People v. Muller, 286 N. Y. 281, 36 N. E. 2d 206 (July, 1941); Maywood Farms Co. v. Milk Wagon Drivers' Union, 313 Ill. App. 24, 38 N. E. 2d 972 (January, 1942); Mason & Dixon Lines v. Odom, 5 C. C. H. Labor Cases ¶ 60,942 (Ga., February, 1942).

sented to by the state when it became a part of the nation and one of precisely the same quality as those enforced in *Carlson, Thornhill* and *Swing.*

We are not here forced, as the Court assumes, to support a constitutional interpretation that peaceful picketing "must be wholly immune from regulation by the community in order to protect the general interest." We do not doubt the right of the state to impose not only some but many restrictions upon peaceful picketing. Reasonable numbers, quietness, truthful placards, open ingress and egress, suitable hours or other proper limitations, not destructive of the right to tell of labor difficulties, may be required. The Court limits its holding to the peculiar circumstances of this case. All decisions necessarily are so limited but from the decisions rules are drawn. By this decision a state rule is upheld which forbids peaceful picketing of businesses by strangers to the business and the industry of which it is a part. The legal kernel of the Court's present decision is that the "sphere" of free speech is confined to the "area of the industry within which a labor dispute arises." This rule is applied, in this case, even though the picketers are publicizing a labor dispute arising from a contract to which the sole owner of the business picketed is a party. Even if the construction contract covered an attached addition to the restaurant, the Court's opinion would not permit picketing directed against the restaurant. To construe this Texas decision as within state powers and the *Wohl* decision as outside their boundaries, plainly discloses the inadequacy of the test presumably employed, that is, the supposed lack of economic "interdependence" between the picketers and the picketed.

The philosophy behind the conclusion of the Court in this case gives to a state the right to bar from picket lines workers who are not a part of the industry picketed. We are not told whether the test of eligibility to picket is to be applied by crafts or enterprises or how we are to determine economic interdependence or the boundaries of particular industries. Such differentiations are yet to be considered. The decision withdraws federal constitutional protection from the freedom of workers outside an industry to state their side of a labor controversy by picketing. So long as civil government is able to function normally for the protection of its citizens, such a limitation upon free speech is unwarranted.